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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 727

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL., ETC., APPELLANTS,

vs.

THE TEXAS COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

FILED JANUARY 29, 1936.

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INDEX

	Original	Print
Record from D. C. U. S., Middle District of Alabama	a	1
Caption (omitted in printing)	a	
Bill of complaint	1	1
Exhibit "A"—Act of January 25, 1927, imposing excise tax on gasoline, etc.	15	22
Exhibit "B"—Act of July 27, 1931, imposing excise tax on gasoline, etc.	18	26
Exhibit "C"—Act of November 5, 1932, imposing tax on gasoline, etc.	21	31
Exhibit "D"—Act of January 31, 1935, imposing excise tax on gasoline, etc.	25	37
Exhibit "E"—Act of July 10, 1935, consolidating levies now in effect, etc.	29	44
Exhibit "F"—Opinion of Attorney General of Alabama, August 22, 1928	35	54
Exhibit "G"—Opinion of Attorney General of Alabama, November 22, 1928	38	58
Exhibit "H"—Opinion of Attorney General of Alabama, July 5, 1935	39	59

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1936.

—7482-C

	Original	Print
Record from D. C. U. S., Middle District of Alabama—Continued.		
Motion to dismiss	47	70
Order setting cause, etc.	52	73
Notice of hearing	53	74
Answer of defendants	56	77
Exhibit "A"—Opinion of Attorney General of Alabama, March 22, 1923	70	91
Amendment to bill of complaint	71	92
Appearance and joinder of Hon. Bibb Graves as Governor	73	93
Stipulation as to submission for final decree	74	93
Stipulation as to statement of evidence and order thereon	76	94
Statement of evidence	78	95
Affidavit of F. L. Tosch	78	95
A. G. Reynolds	81	98
S. A. Herbert	83	100
D. L. Gilland	85	102
L. H. Rogge	87	103
Howell Turner	89	105
A. B. Tucker	91	108
Mark L. Tucker	93	109
Agreed statement of facts	94	110
Exhibit 1—Opinion of Attorney General of Alabama, July 14, 1933	115	126
Exhibit 2—Schedule showing amount of gasoline withdrawn from storage, etc., 1930-1935	117	128
Exhibit 7—U. S. Government motor fuels tax exemption certificate	118	129
Exhibits 8 to 14, inclusive—Monthly gasoline tax returns of The Texas Co.	119	130
Exhibit 15—Letter, A. B. Tucker to The Texas Co., August 2, 1933	126	137
Exhibit 16—Letter, A. B. Tucker to "All Licensed Dealers", January 24, 1934	128	138
Exhibits 17 to 21, inclusive—Correspondence between A. B. Tucker and The Texas Co.	129	139
Exhibit 22—Letter, A. B. Tucker to "All Dealers", July 9, 1935	134	144
Exhibit 3—Contract between United States and The Texas Co., June 21, 1934	135	145
Exhibit 4—Contract between United States and The Texas Co., October 1, 1934	150	167
Exhibits 5 and 6—Contracts between Company and United States under which deliveries were made from company controlled stations, etc.	159	175
Exhibit 23—Contract between Company and Treasury Dept.	174	194
Exhibit 24—Contract between Company and Interior Dept.	187	214

	Original	Print
Record from D. C. U. S., Middle District of Alabama—Continued.		
Findings of fact and conclusions of law	193	221
Decree	196	224
Stipulation re acceptance of service of writ of injunction, etc	198	225
Opinion, Ervin, J.	199	226
Dissenting opinion, Hutcheson, J.	206	233
Petition for appeal	212	239
Assignments of error	214	240
Order allowing appeal	222	243
Bond on appeal (omitted in printing)	225	
Citation and service (omitted in printing)	227	
Notice of appeal	229	244
Stipulation as to transcript of record	230	245
Clerk's certificate (omitted in printing)	234	
Statement of points to be relied upon and designation as to printing record	235	247

[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

No. 662

THE TEXAS COMPANY, a Corporation, Plaintiff,

v.

ALBERT A. CARMICHAEL, Attorney General of the State of Alabama; Henry S. Long, President of the State Tax Commission of Alabama, and John P. Kohn, Sr., and W. W. Ramsey, Associate Members of the State Tax Commission of Alabama, Defendants

BILL OF COMPLAINT

To the Honorable Judge of the District Court of the United States for the Middle District of the State of Alabama, sitting in the Northern Division of said District:

The Texas Company, a corporation organized and existing under the laws of the State of Delaware and a citizen of said state, brings this its bill against Albert A. Carmichael as Attorney General of the State of Alabama, Henry S. Long as President of the State Tax Commission of said state, and John P. Kohn, Sr., and W. W. Ramsey as Associate Members of the State Tax Commission of said state, citizens of said state, and whose residences are hereinafter stated, and plaintiff complains and says:

First. The plaintiff is a corporation duly organized and existing under the laws of the State of Delaware and duly qualified in accordance with the laws of the State of Alabama to do business in the State of Alabama. Plaintiff's principal place of business in the State of Alabama is in the City of Birmingham, Alabama.

Second. The defendant Albert A. Carmichael is the Attorney General of the State of Alabama. The defendant

Henry S. Long is President of the State Tax Commission of Alabama, and the defendants John P. Kohn, Sr., and W. W. Ramsey are Associate Members of the State Tax Commission of Alabama and as such the defendants are the officials of the State of Alabama charged with the administration, enforcement and execution of the acts of the Legislature of Alabama imposing certain excise taxes on the sale, distribution or withdrawal in Alabama of gasoline and other liquid motor fuels, which acts are hereinafter set forth or described in paragraph Fifth. Defendants are all citizens and residents of the State of Alabama and either now reside in Montgomery County, Alabama, or as such officers have their respective offices for the conduct of the State business with which they are charged in the City of Montgomery, Montgomery County, Alabama, in the Middle District of Alabama, and are all over the age of twenty-one years.

[fol. 2] Third. The amount involved in this controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

Fourth. The controversy arises solely under the Constitution of the United States and is based upon the alleged unconstitutionality of the statutes of the State of Alabama set out and referred to and either recited in paragraph Fifth hereof or attached as exhibits to this bill. And the plaintiff seeks herein both an interlocutory and a final judgment suspending or restraining the enforcement, operation and execution of said statutes by restraining the action of the officers of the State of Alabama above enumerated as defendants herein from the enforcement and execution of said statutes.

Fifth. In 1923 the Legislature of the State of Alabama enacted an act approved February 10, 1923 (General Acts of Alabama of 1923, p. 36), imposing an excise tax of two cents per gallon upon all gasoline or other liquid motor fuels sold within the state. The State Legislature in 1927 adopted an act approved August 27, 1927 (General Acts of Alabama of 1927, p. 326), materially amending the said 1923 Act. The 1923 Act as amended by said 1927 Act is as follows:

"Be it enacted by the Legislature of Alabama:

"That the title and Sections 1, 2, 3, 4, 5, 6, 7, 8, 11 and 12 of an act, entitled 'An Act imposing an excise tax on persons, corporations, copartnerships, companies, agencies or associations engaged in the business of selling, or distributing gasoline or other liquid motor fuels in this State—providing for the collection and payment of such tax and the distribution of the funds derived therefrom and fixing the penalties for the violation of any of the provisions of this act, approved Feb. 10, 1923, be and the same are hereby amended to read as follows:

"Section 1. That the Title of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows: to impose an excise tax on persons, corporations, copartnerships, companies, agencies or associations engaged in the business of selling, distributing, storing or withdrawing from storage for any purpose whatsoever gasoline or other liquid motor fuel or devices or substitutes therefor in this State; and providing for the collection and payment of such tax and distribution of the funds derived therefrom, and providing for its enforcement and fixing a penalty for the violation of any of the provisions hereof.

"Section 2. That Section 1 of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows: as used in this act, the term 'gasoline' shall include gasoline, naptha and other liquid motor fuels or any devices or substitutes therefor, commonly used in internal combustion engines, provided that nothing contained in this act shall apply to those products commercially known as 'Kerosene oil', 'fuel oil', 'crude oil' used for lighting or heating purposes. The word 'Person' means and includes every person, corporation, copartnership, company, agency or associations, singular or plural. The term 'Distributor' shall include any person who shall engage in the selling of gasoline as herein defined in this State by wholesale in domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The term 'retail dealer' shall include any person herein defined as 'distributor' who is also engaged in the sale of gasoline as herein defined, at any place in this State, in broken quantities. The term 'storer' as herein used shall include any person who ships

gasoline into this State, in tank quantities and stores the same and withdraws or uses the same for any purpose.

[fol. 3]. "Section 3. (a) That Section 2 of the above mentioned act, approved Feb. 10, 1923, shall be made to rear as follows: Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the selling, distributing or withdrawing from storage for any use gasoline as herein defined in this State, provided however that this excise tax shall not be levied upon the sale of gasoline in interstate commerce, and provided further that where the excise tax of two cents per gallon upon the sale of such gasoline shall have been paid by a distributor or by a retail dealer or storer such payment shall be sufficient, the intention being that the tax shall not be paid but once. (b) The excise tax imposed by subdivision (a) of this section shall apply to persons, firms, corporations, dealers or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals be for sales or other use—provided, that 'sellers' of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and storers and distributors shall compute and pay this tax on the basis of their withdrawal or distributions.

"Section 4. (a) That Section 3 of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows: On or before the 20th day of each month after this act shall have taken effect, every person upon whom this excise tax is levied shall render to the State Tax Commission on forms prescribed by such commission a true and correct statement of all sales and withdrawals of gasoline made by him or them during the next preceding month, liable for the payment of the excise tax herein prescribed, and shall furnish to said commission such additional information as such Commission may require upon blanks to be formulated and furnished by said Commission, and at the time of making such report shall pay to the State Tax Commission an amount of money equal to the excise tax herein laid. (b) The statement herein required to be made by the distributor, storer or retail dealer shall be sworn to before some officer authorized to administer oaths and any false or fraudulent statement sworn to shall constitute perjury

and upon conviction thereof the person so convicted shall be punished as provided by law for the crime of perjury.

"Section 5. That Section 4 of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows: All distributors, storers, or retail dealers shall keep, for not less than two years, within the State of Alabama at some certain place or office such books, documents or papers as will clearly show the amount of sales or withdraw-ls of gasoline made in this State covered by this Act.

"Section 6. That Section 5 of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows: within 30 days after the passage of this act, every distributor, storer or retail dealer engaged in the sale or withdrawal of gasoline shall make a report on blanks furnished by the State Tax Commission to the State Tax Commission showing the place and post office address at which he is engaged in the business of distributor or storer or retail dealer in gasoline, which information shall be entered by the State Tax Commission on a book kept for that purpose, and should such distributor, storer or retail dealer move his place of business from one post office address to another, such distributor, storer, or retail dealer shall within 30 days thereafter notify the State Tax Commission of such removal giving the former place and post office address and also the place and post office address to which the business has been removed. After this act becomes effective no person shall become a distributor, storer, or seller of gasoline in this State until he shall have made such reports to the State Tax Commission.

[fol. 4] "Section 7. That section 6 of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows: If any distributor, storer or retail dealer in gasoline in this State covered by the provisions in this act shall fail to make the reports or any of them, to the State Tax Commission as herein required, or shall fail to keep the records required by Section 5 hereof, such distributor, storer or retail dealer shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $50.00 nor more than $300.00 for each of such offense-.

"Section 8. That Section 7 of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows: It shall be the duty of the State Tax Commission to enforce

the provisions of this act and the State Tax Commission shall have the right itself or by any of its members or its agents to examine the books, reports and accounts of every such distributor, storer, or retail dealer of gasoline covered in this act.

"Section 9. That Section 8 of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows: The proceeds of the excise tax prescribed in this act shall, when collected, be paid into the State Treasury, and placed to the credit of the sixty-seven counties of the State, and shall be divided and distributed equally among the sixty-seven counties of this State and paid to each of the several counties as provided by law. Provided however, that all the funds derived by the several counties from said tax shall be expended exclusively for maintenance and repair of roads, highways and bridges in said county. The use or expenditure of any of said funds in any other manner or for any other purpose than as provided herein by the governing body of any county or any individual member of said body shall constitute a misdemeanor punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail at hard labor for the county for not less than one nor more than twelve months. The State Highway Commission shall have the authority to inspect the work upon which such funds are expended, and if in the judgment of the State Highway Commission, it appears that such funds are not being expended profitably or correctly, the State Highway Commission, shall report the matter to the Chief Examiner of Public Accounts. The Chief Examiner of Public Accounts is hereby especially charged with the duty of examining into and determining each year whether or not said funds have been used or expended as herein provided. Whenever said Examiner of Public Accounts discovers a violation of any provisions of this section he shall forthwith report same to the Attorney General whose duty it shall be to direct the prosecution of said offense.

"Section 9. (This section brought forward from the 1923 Act without amendment) The acceptance of any amount paid for the excise tax provided for in this Act shall not preclude the collection of the amount actually due. However, the amount actually paid shall constitute a credit against the amount actually due.

"Section 10. (This section brought forward from the 1923 Act without amendment) The forms of all statements and reports required herein shall be prescribed and furnished by the State Tax Commission. All costs of the enforcement of this Act shall be paid out of the State's share of the funds derived from the excise tax herein prescribed, upon the warrant of the State Auditor drawn upon the voucher of the Chairman of the State Tax Commission and approved by the Governor.

"Section 10. That Section 11 of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows: If distributor, storer, or retail dealer in gasoline covered by this act shall fail to make the monthly return and to pay the tax prescribed, as provided by this act, the tax shall be deemed delinquent within the meaning of this act, and there shall be added to the amount of the tax a penalty of twenty-five per cent. If in the opinion of the State Tax Commis- [fol. 5] sion a good and sufficient cause and reason is shown for such delinquency the State Tax Commission may remit the penalty, otherwise the penalty shall be paid. The State Tax Commission shall be authorized and empowered to make return for the delinquent tax-payer upon such information as it may reasonably obtain, and add thereto the penalty as provided in this section of this act. The State Tax Commission shall, as soon as is practicable, and before the 30th day of the month, certify to the State Auditor and the State Treasurer names of all persons liable to pay the tax herein provided together with the post office address and the amount of the tax, and if any such tax and penalties shall not have been paid, the chairman of the State Tax Commission shall issue execution for the collection of such tax directed to any sheriff of the State of Alabama, who shall proceed to collect the same in the manner now provided by law for the collection of delinquent tax by the county tax collectors and make returns of such executions to the State Tax Commission. The tax and all penalties herein provided for shall be held as a debt payable to the State of Alabama by the person against whom the same shall be charged and all such penalties and assessments shall be a lien upon the property in this State of the party charged therewith.

"Section 11. That Section 12 of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows:

Any distributor, storer or retail dealer who shall violate any of the provisions of this act may be restrained and the proper prosecution instituted in the name of the State of Alabama by its Attorney General or under his direction by any Circuit Solicitor of the State, from distributing, selling or withdrawing from storage any gasoline, the sale or withdrawal of which is taxable under this Act, until such person shall have complied with the provisions of this Act. This act shall take effect on the 1st day of the month next succeeding its passage, and upon approval of the Governor.

"Section 12½. Each freight agent of the Railroad Companies operating in the State of Alabama shall report to the State Tax Commission on the first day of October, January, April and July of each year all shipments of gasoline and lubricating oils or substitutes therefor received at said station on said railroads during the preceding three months, giving the name and address of the consignor and consignee, shipping and receiving said gasoline or lubricating oils or substitutes therefor and the number of gallons or pounds contained in each and every shipment.

"Approved August 27, 1927."

In 1931 the Legislature of Alabama amended the above mentioned act by an act approved July 15, 1931 (General Acts of Alabama of 1931, p. 458), the amendment to said act being as follows:

"Section 9. That Section 8 of the above mentioned Act, approved February 10, 1923, shall be made to read as follows: The proceeds of the excise tax prescribed in this Act shall, when collected be paid into the State Treasury, and placed to the credit of the sixty-seven counties of the State, and shall be divided and distributed equally among the sixty-seven counties of this State and paid to each of the several counties as provided by law. Provided, however, that all the funds derived by the several counties from said tax shall be expended exclusively for the maintenance, or construction or repair of roads or highways or bridges in said county. The use or expenditure of any of said funds in any other manner or for any other purpose than as provided herein, by the governing body of any county or any individual member of said body shall constitute a mis- [fol. 6] demeanor punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, and

by imprisonment in the county jail at hard labor for the county for not less than one nor more than twelve months. The State Highway Commission, shall have the authority to inspect the work upon which such funds are expended, and if in the judgment of the State Highway Commission, it appears that such funds are not being expended profitably or correctly, the State Highway Commission, shall report the matter to the Chief Examiner of Public Accounts. The Chief Examiner of Public Accounts is hereby especially charged with the duty of examining into and determining each year, whether or not said funds have been used or expended as herein provided. Whenever said Examiner of Public Accounts discovers a violation of any provisions of this section he shall forthwith report same to the Attorney General whose duty it shall be to direct the prosecution of said offense.

"Section 2. That the acts or actions of County Courts of Commissioners or Boards of Revenue or other county governing bodies, in paying out or expending gasoline tax monies, before the passage of this Act under or by authority of the gasoline excise tax act, said act having been approved Feb. 10, 1923 and found at page 36 of the General Acts of the Legislature of Alabama of 1923, or expended under or by authority of an act of the Legislature of Alabama approved August 27, 1927 and found at page 326 of the General Acts of the Legislature of Alabama of 1927 and expended or paid out for the purpose of maintaining or repairing or constructing highways or roads or bridges in the county in which said monies may have been expended, are hereby validated, and after the passage of this Act no question shall be raised as to the validity or legality of such expenditures.

"Section 3. All general laws and parts of general laws in conflict with this act are hereby repealed.

"Section 4. This act shall go into effect immediately upon its approval by the Governor.

"Section 5. If any section, clause, provision or portion of this Act shall be held to be invalid, or unconstitutional, by any Court of competent jurisdiction, such holding shall not effect any other Section, clause, provision or portion of this Act, which is not itself unconstitutional."

The Legislature of Alabama in 1927 also adopted an act approved January 25, 1927, imposing an additional excise tax of two cents per gallon on the sale, distribution or withdrawal from storage of gasoline or other liquid motor fuels within the state (General Acts of Alabama of 1927, p. 16). The provisions of this act are set out in Exhibit A hereto attached and made a part hereof.

The Legislature of Alabama in 1931 adopted another act imposing an excise tax of one cent per gallon on all persons selling, distributing or withdrawing from storage gasoline or other liquid motor fuels in the state, which act was approved July 27, 1931 (General Acts of Alabama of 1931, p. 859). A copy of this act is hereto attached, marked Exhibit B, and is made a part hereof.

The Legislature of Alabama in 1932 adopted an act approved November 5, 1932 (General Acts of Alabama of 1932, p. 314), imposing an additional tax of one cent per gallon on all persons selling, distributing or withdrawing from storage gasoline or other liquid motor fuels in the state. A copy of this act is hereto attached, marked Exhibit C, and is made a part hereof.

[fol. 7] The Legislature of Alabama in 1935 adopted an act approved January 31, 1935, imposing an excise tax on all persons engaged in the business of selling, distributing or withdrawing from storage gasoline or other liquid motor fuels in the state of two cents per gallon, which suspended the operation of the two acts last above mentioned. A copy of this act is hereto attached, marked Exhibit D, and made a part hereof.

Under the acts now in effect a total tax of six cents per gallon is imposed on those engaged in the business of selling, distributing or withdrawing from storage gasoline or other liquid motor fuels.

The Legislature of Alabama in 1935 adopted an act approved July 10, 1935, which in effect consolidates the levies now in effect and imposes an excise tax of six cents per gallon on all gasoline or other liquid motor fuels sold, distributed or withdrawn from storage within the state. This act becomes effective on October 1, 1935, and a copy of the provisions of the act so far as here pertinent are hereto attached, marked Exhbiit E, and made a part hereof.

The above mentioned acts are hereafter referred to as "gasoline excise tax acts."

Sixth. Since 1927 the plaintiff has been and is now engaged in the business of manufacturing, refining, buying and selling gasoline and other liquid motor fuels commonly used in internal combustion engines and in such business is selling and offering for sale at wholesale and retail in practically every county in the State of Alabama gasoline and other liquid motor fuels of the character, kind and quality made the subject of the taxing provisions of the gasoline excise tax acts set forth or mentioned and described in paragraph Fifth hereof. Plaintiff's immediate predecessor in title and interest was engaged in said business in the State of Alabama for more than fifteen years before plaintiff succeeded to its rights, title and interest in said business.

Plaintiff has now invested a large amount of money, to-wit, over $1,000,000.00, in plant and equipment at its various places of business in the State of Alabama for the conduct of its business of offering for sale and selling in said state gasoline and other liquid motor fuels and other petroleum products, and intends in the State of Alabama to continue the conduct of said business in strict compliance with the laws of the State of Alabama in so far as such laws may be valid and constitutional, and in such conduct of its business will continue to offer for sale and sell large quantities of gasoline and other liquid motor fuels, meeting the specifications as to standard and quality and any other specifications required by the laws of Alabama. Plaintiff has not and is not now engaged in the business of storing gasoline or other liquid motor fuels in the State of Alabama, and has not stored and does not store such commodities except in connection with its business of selling such commodities in said state and then only to the extent that such storing is a part of or is necessary or incidental to its said business of selling said motor fuels in said state.

Seventh. Plaintiff has during the past five years sold and delivered in Alabama approximately 281,254 gallons of gasoline to the United States or to its departments or agencies, used by it as means for the performance of its governmental functions in the State of Alabama as follows: Department of Interior, Department of Commerce, Department of Agriculture, Department of Justice, War Department, Navy Department, Post Office Department, Treasury Department, Veterans Administration, and certain other

of its departments or agencies (which departments or agencies are included in the words "United States" when sales or withdrawals for sales to the United States are referred to herein) for which the United States has paid or agreed to pay prices which have not included or do not include any of the taxes imposed by said gasoline excise tax. All of said gasoline was withdrawn from storage in Alabama for the purpose of making sale and delivery of same to the United States. Due to the nature and character of the gasoline it is impossible to deliver same to the pur- [fol. 8] chasers thereof without withdrawing same from storage, as the act of withdrawal is a necessary constituent and integral element in consummating the sale.

Plaintiff in compliance with the provisions of the said gasoline excise tax acts has made reports each month on forms furnished by the State Tax Commission of Alabama showing the sales or withdrawals from storage of gasoline made by it as required by the acts, and has shown in spaces provided in said forms the amount of gasoline withdrawn from storage and sold to the United States. A copy of the opinion of the Attorney General of Alabama dated August 22, 1928, is hereto attached, marked Exhibit F, and is made a part hereof, and no officials of the State have demanded or sought to collect since the date of this opinion from plaintiff any taxes imposed by said gasoline excise tax acts on account of sales or withdrawals from storage for sales of gasoline to the United States until to-wit June 17, 1935.

On November 22, 1928, the Attorney General of Alabama rendered a written opinion to Honorable John G. Sargent, Attorney General of the United States, to the effect that on sales of liquid motor fuels to the United States in Alabama there was no tax intended, and that where the tax had been paid in the past on such sales, the State had no law by which refund could be made. A copy of this opinion is hereto attached, marked Exhibit G, and is made a part hereof.

On June 17, 1935, the plaintiff received at its Atlanta, Georgia, office a telegram dated June 17, 1935, as follows:

"The Texas Company, Atlanta, Georgia:

"A thorough audit of your books discloses that you have withdrawn one million three hundred thousand gallons gasoline from Alabama storage on which excise tax has not

been paid STOP Demand is hereby made on you for the payment of excise tax on this gasoline computed at the rate prescribed by law plus interest and penalty STOP Make check payable to undersigned and address reply to this office. Thomas E. Skinner, Special Agent, State Tax Commission."

Plaintiff is informed and believes and therefore avers that the basis for the claim for excise taxes on gasoline set out in said telegram was solely on account of gasoline withdrawn from storage in Alabama by the plaintiff for sale and delivery to the United States, and that the demand for payment of said alleged taxes, including interest and penalties, exceeds the sum of $100,000.00.

On July 5, 1935, the Attorney General of Alabama rendered another opinion to the State Tax Commission to the effect that refiners, storers and distributors of gasoline in this state were liable for the gasoline excise taxes on all gasoline withdrawn from storage in Alabama and sold or delivered to the United States. A copy of this opinion is hereto attached, marked Exhibit H, and is made a part hereof.

On, to-wit, September 1, 1935, plaintiff, at its Atlanta office, received a communication through the United States Mails from the State Tax Commission as follows:

"August 30, 1935.

"The Texas Company, Atlanta, Ga.:

"Under an opinion issued by the Attorney General's Department dated July 5, the State Tax Commission can not permit deductions from gasoline sales by reason of gallonage sold to the United States Government of Federal Agencies. Under this opinion the tax applies to all sales and withdrawals made in this State.

[fol. 9] "You will, therefore, please add to your August sales such deductions as you may have made when preparing your returns, covering July sales and remit the tax to this department along with tax for your August sales, on or before September 20.

"As you will recall, the Gasoline Department of this commission advised you under date of July 9, of the above mentioned opinion stating, 'This is for your information and guidance.'

"Please bear this in mind when preparing your returns in the future as no allowance can be made by reason of sales to the Federal Government.

"The above refers only to those companies which have been making sales to Federal Agencies and deducting such sales from the total number of gallons on which the tax is computed.

Yours very truly, State Tax Commission, by
(Signed) Henry S. Long, President."

Under the provisions of this letter it appears that the members of the State Tax Commission of Alabama are making demand that plaintiff pay the said excise taxes not only on account of its withdrawal from storage of gasoline withdrawn for the purpose of selling to the United States, but is also claiming that said taxes are due on account of all said sales made to the United States.

Eighth. Plaintiff, since May 14, 1928, the date of the decision of the Supreme Court of the United States in Panhandle Oil Company v. State of Mississippi ex rel. R. H. Knox, Attorney General, has been almost continuously and is now withdrawing gasoline from storage in Alabama for the purpose of delivering and selling same to the United States in Alabama, but it has not since that date and is not now including the amount of the excise taxes imposed by said gasoline excise tax acts in the purchase price of sales made to the United States and has not since said date paid to the State of Alabama any of said taxes imposed under said acts on account of withdrawals from storage or sales and deliveries of gasoline to the United States.

The United States through its departments or agencies is from time to time requesting plaintiff to sell and to offer to sell to it gasoline to be withdrawn from storage in Alabama and to be sold and delivered to it in various places in Alabama. Plaintiff is informed and believes and therefore avers that it is impracticable, if not impossible, for the United States to carry on and transact many of its necessary and important governmental functions in Alabama without having gasoline withdrawn from storage in the state and sold and delivered to it at various places therein. Plaintiff withdraws from storage and sells to the United States and intends to continue to offer to sell and to sell to the United States if it offers are accepted gasoline of

the kind and quality desired by the United States, but is unable to sell and deliver said gasoline to the United States without first withdrawing it from storage. Plaintiff is informed and believes and therefore avers that the United States, through its departments and agencies in Alabama, is now making and will continue to make requests that plaintiff and other persons engaged in the business of selling or distributing gasoline in Alabama make bids or offers to sell to it gasoline which will be withdrawn from storage in Alabama and sold and delivered to it in Alabama. Plaintiff is informed and believes and therefore avers that the defendant Albert Carmichael, as Attorney General of Ala- [fol. 10] bama, and the other defendants, as members of the State Tax Commission of Alabama will in addition to the claims and demands already addressed to plaintiff, continue to make claims and demands for the excise taxes, interest and penalties on the withdrawals from storage, sale and delivery of the gasoline which it will sell in Alabama to the United States in the future. Plaintiff is informed and believes and therefore avers that the amount of the claims for such excise taxes on future transactions by plaintiff with the United States will exceed $3,000.00.

Plaintiff avers that if it is required to pay the said excise taxes on all gasoline withdrawn from storage in Alabama for the purpose of making sales to the United States, it will add to the price at which plaintiff will sell and offer to sell gasoline to the United States the amount of such taxes, and it is informed and believes and therefore avers that all other parties withdrawing from storage gasoline for the purpose of selling same to the United States will also add to their price for such commodity the excise tax imposed by said gasoline excise tax acts, if such tax is legally due on such transactions.

Plaintiff avers that the necessary and inevitable operation of the said statute imposing taxes on withdrawals from storage of gasoline for the purpose of completing the sales to the United States as construed by the defendants as officials of the State of Alabama places a direct tax burden on the United States and will directly retard, impede, and *and* burden the execution by the United States of its constitutional powers to carry on its governmental functions in the State of Alabama.

Ninth. Section 11 of the gasoline excise tax act set out in paragraph hereof imposes a penalty equivalent to twenty-five per cent of the amount of the taxes imposed under that act where payments are not made as required by the provisions of said act. Said Section 11 is as follows:

"If distributor, storer, or retail dealer, in gasoline covered by this act shall fail to make the monthly return and to pay the tax prescribed, as provided by this act, the tax shall be deemed delinquent within the meaning of this act, and there shall be added to the amount of the tax a penalty of twenty-five per cent. If in the opinion of the State Tax Commission a good and sufficient cause and reason is shown for such delinquency the State Tax Commission may remit the penalty, otherwise the penalty shall be paid. The State Tax Commission shall be authorized and empowered to make return for the delinquent tax-payer upon such information as it may reasonably obtain, and add thereto the penalty as provided in this section of this act. The State Tax Commission [illegible] as soon as is practicable, and before the 30th day of the month, certify to the State Auditor and the State Treasurer names of all persons liable to pay the tax herein provided together with the post office address and the amount of the tax, and if any such tax and penalties shall not have been paid, the chairman of the State Tax Commission shall issue executions for the collection of such tax directed to any sheriff of the State of Alabama, who shall proceed to collect the same in the manner now provided by law for the collection of delinquent tax by the county tax collectors and make returns of such executions to the State Tax Commission. The tax and all penalties herein provided for shall be held as a debt payable to the State of Alabama by the person against whom the same shall be charged and all such penalties and assessments shall be a lien upon the property in this State of the party charged therewith."

Similar or substantially similar provisions are contained in the other acts imposing the additional gallonage taxes now in effect.

The act approved July 10, 1935, copy of which is attached hereto as Exhibit E, which goes into effect October 1, 1935, in which all of the levies are consolidated, contains similar [fol. 11] penalty provisions for the failure to pay all taxes imposed under the act before they are delinquent.

Under the provisions of an act of the Alabama Legislature approved October 5, 1932 (General Acts of Alabama of 1932, p. 57) each person before engaging in the business of selling, distributing or withdrawing from storage gasoline or other motor fuels in Alabama must procure a license from the State Tax Commission to carry on such business. Section 6 of said act provides that if any such distributor fails to pay all the taxes imposed upon him for engaging in the business of selling, distributing and withdrawing from storage of gasoline, the State Tax Commission may revoke his license upon ten days' written notice to him. Section 7 provides that any person engaging in the business of selling, distributing or withdrawing from storage gasoline without having a license therefor from the State Tax Commission is subject to criminal prosecution and to other penalties. Said Sections 6 and 7 of said act are as follows:

"Section 6. Issuance of License and Power to Revoke Same; Non-Transferability of License.—Upon approval of the bond required as hereinbefore provided, the State Tax Commission shall issue a license authorizing the distributor to engage in the business of selling, distributing and withdrawing from storage, gasoline, but said license may be revoked by the State Tax Commission at any time upon ten days' written notice to the distributor if the distributor shall fail to comply with any of the provisions of this Act, or to pay within the time required by law all excise taxes and penalties required to be paid by such distributor. The license herein authorized to be issued shall be a personal privilege, and shall not be transferable.

"Section 7. Penalties.—Any person who shall engage in the business, for which a license is herein provided, without having a license as herein required, shall forfeit all right to sell, distribute, or withdraw from storage, gasoline in the State of Alabama for a period of one year. Each person engaging in the business of selling, distributing or withdrawing from storage gasoline without first obtaining and having a license therefor as herein required shall be guilty of a misdemeanor, and upon conviction, be fined not less than two hundred fifty or more than five hundred dollars, or imprisoned for a term of not less than thirty or more than one hundred eighty days, or both, at the discretion of the Court."

Tenth. Plaintiff is advised by its counsel and believes and therefore avers that the said gasoline excise tax acts are unconstitutional, void, discriminatory and offensive and repugnant to the provisions of the Constitution of the United States of America in the following several respects and for the following several reasons:

(a) The excise tax of six cents per gallon measured by all gasoline and other liquid motor fuels sold by plaintiff to the United States in the State of Alabama is a tax on the United States contrary to the Constitution of the United States.

(b) The excise tax of six cents per gallon measured by all gasoline and other liquid motor fuels withdrawn from storage in the State of Alabama for the purpose of selling to the United States is a tax on the United States contrary to the Constituion of the United States.

(c) The excise tax of six cents per gallon imposed on exercise of the privilege by plaintiff of selling or withdrawing from storage for the purpose of selling gasoline or other liquid motor fuels to the United States is a direct tax on the United States contrary to the Constitution of the United States.

(d) The excise tax of six cents per gallon measured by all gasoline and other liquid motor fuels sold to the United States in the State of Alabama is a tax on the United States, the necessary operation of which is directly to retard, impede and burden the execution by the United States of its [fol. 12] constitutional powers to transact or perform its governmental functions in the State of Alabama, and said tax is therefor contrary to the Constitution of the United States.

(e) The excise tax imposed by said acts on all gasoline and other liquid motor fuels withdrawn from storage and sold by plaintiff to the United States is in violation of the right guaranteed to plaintiff by the Constitution of the United States to engage in such transactions without liability for the payment of said tax.

(f) The excise tax of six cents per gallon measured by all gasoline and other liquid motor fuels withdrawn from storage by plaintiff for sale in the State of Alabama to the United States is violative of the rights of plaintiff and of

the United States guaranteed to them under the Constitution of the United States.

(g) The excise tax of six cents per gallon on gasoline and other liquid motor fuels imposed on plaintiff on account of withdrawals from storage of such commodities for sales of same by plaintiff to the United States deprives plaintiff of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(h) The excise tax imposed by said acts on plaintiff on account of sales of gasoline and other liquid motor fuels made by plaintiff in the State of Alabama to the United States deprives plaintiff of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Eleventh. Plaintiff has no adequate remedy at law for redress of the wrongs and grievances herein complained of, and unless the defendants herein are restrained in the enforcement and execution of said gasoline excise tax acts in so far as they tax sales of gasoline and other liquid motor fuels by plaintiff to the United States or tax the withdrawal from storage of gasoline or other liquid motor fuels by plaintiff for the purpose of selling same to the United States, plaintiff will suffer immediate, continuing and irreparable injury, loss and damage, in that:

(a) Plaintiff will be subjected to the penalties aforesaid provided by said acts in the sum of twenty-five per cent of the amount of the tax imposed on all transactions involving the sale and delivery of gasoline and other liquid motor fuels made by plaintiff to the United States in the State of Alabama unless plaintiff complies with the provisions of said acts requiring the payment of said taxes on account of said transactions.

(b) Unless plaintiff pays all the taxes imposed by said gasoline excise tax acts on account of all sales and deliveries of gasoline and other liquid motor fuels by it in Alabama to the United States, the amount of such tax and the penalties thereon will be a lien against all the property of plaintiff in Alabama, superior to all other liens except tax liens to the State antecedent in date.

(c) Unless plaintiff makes monthly reports to the State Tax Commission of all of its sales and deliveries of gasoline and other liquid motor fuels in Alabama to the United States as required by the provisions of said gasoline excise tax acts, it will be subjected to the criminal prosecutions and fines or penalties imposed by said acts.

(d) Upon the plaintiff's failure to pay all of the taxes imposed by said gasoline excise tax acts on sales and deliveries of gasoline and other liquid motor fuels made by it in the State of Alabama to the United States it is subjected to the revocation by the State Tax Commission of its license to sell, distribute or withdraw from storage gasoline and other petroleum products in the state, and if such action is taken by said Commission, it will result in immense and irreparable damage to plaintiff.

[fol. 13] (e) Plaintiff has no adequate remedy either at law or in equity for the recovery of the illegal taxes demanded by the defendants if it pay same as demanded by said defendants.

(f) Plaintiff has no adequate remedy if it pays such illegal taxes demanded by the defendants in that there is no provision for the payment of interest on a refund of taxes paid to the State Tax Commission under mistake of law or fact or where the taxes are illegally demanded and collected by the State Tax Commission.

(g) If the plaintiff pays the illegal taxes claimed and demanded by the defendants, it will have to institute a multiplicity of suits for the recovery of same, as plaintiff is required by said gasoline excise tax acts to make payments of the taxes on the 20th day of each month following the month in which it made sales and deliveries of gasoline in the State of Alabama to the United States.

(h) If plaintiff pays the illegal taxes demanded by the defendants it will have to institute suits against each of the sixty-seven counties in the State of Alabama for the recovery of that portion of the illegal taxes collected by the State Tax Commission and distributed to such counties, as the statutes of Alabama provide that a distribution of one-half the amount of such taxes collected must on the 10th day of each month following the month of collection be distributed to said counties, and the only remedy available to plaintiff

for the recovery of said illegal taxes so paid and distributed to said counties is to institute a separate suit each month against each county for the recovery of that portion of said taxes paid to it, which will result in a great multiplicity of suits and will entail great expense and irreparable loss to the plaintiff.

(i) The right of plaintiff to recover any of said illegal taxes if paid by plaintiff to the State Tax Commission is very doubtful.

Wherefore, plaintiff prays that your honorable Court will make parties defendant herein the defendants hereinabove named and cause subpœnas to issue from this honorable Court to each and every, the defendants, requiring them to appear and answer to this bill in equity within such time as may be fixed by your honorable Court, and that the judge of this Court call to his assistance to hear and determine the application *to* plaintiff for an interlocutory injunction in the premises two other judges as required by the laws of the United States in such cases and set down the hearing hereof at such day as may be fixed by your honorable Court upon five days' notice of such hearing to the defendants and to the Honorable Bibb Graves, Governor of the State of Alabama, as provided by the statutes of the United States in such cases made and provided, and that upon such hearing this Court will grant an interlocutory injunction suspending and restraining the enforcement, operation or execution of said gasoline excise tax acts by restraining the action of the defendants and each of them from the enforcement or execution of said acts in so far as said acts levy or impose excise taxes on plaintiff for selling gasoline or other liquid motor fuels in the State of Alabama to the United States or for withdrawing from storage in Alabama such commodities for the purpose of selling same to the United States, and that upon the final hearing of this cause a permanent injunction of like effect be issued and granted against said defendants, and that plaintiff have such other and further relief in the premises as to this Court may seem just.

John S. Coleman, Solicitor for Plaintiff. Bradley, Baldwin, All & White, of Counsel.

[fol. 14] *Duly sworn to by F. L. Tosch. Jurat omitted in printing.*

[fol. 15] EXHIBIT "A" TO BILL OF COMPLAINT

Be it Enacted by the Legislature of Alabama, That:

Section 1. As used in this Act, the term gasoline shall include gasoline, naphtha and other liquid motor fuels or any devices or substitutes therefor, commonly used in internal combustion engines; provided however that nothing contained in this Act shall be held to apply to these products known commercially as "kerosene oil", "fuel oil" or "crude oil" used for lighting or heating purposes. The word person means and includes persons, corporations, copartnerships, companies, agencies or associations, singular or plural. The term distributor shall include any person who engages in the selling of gasoline in this State by wholesale domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The term retail dealer shall include any person herein defined as distributor who is also engaged in the selling of gasoline in this State at any place in this State in broken quantities. The term storer as herein used shall include any person who ships gasoline into this State in tank quantities and stores the same and withdraws or uses the same for any purpose.

Section 2. Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the selling, distributing or withdrawing from storage for any use gasoline as herein defined in this State, provided however that this excise tax shall not be levied upon the sale of gasoline in interstate commerce, and provided further that where the excise tax of two cents per gallon upon the sale of such gasoline shall have been paid by a distributor or by a retail dealer or storer such payment shall be sufficient, the intention being that the tax shall not be paid but once.

Section 3. The excise tax imposed by section two hereof shall apply to persons, firms, corporations, dealers or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals be for sales or other use; provided, that "sellers" of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and storers

and distributors shall compute and pay this tax on the basis of their withdrawals or distributions.

Section 4. On or before the 20th day of each month after this Act shall have taken effect, every person upon whom this excise tax is levied shall render to the State Tax Commission on forms prescribed by such Commission a true and correct statement of all sales and withdrawals of gasoline made by him or them during the next preceding month, liable for the payment of the excise tax herein prescribed, and shall furnish to said Commission such additional information as such Commission may require upon blanks to be formulated and furnished by said Commission, and at the time of making such report shall pay to the State Tax Commission an amount of money equal to the excise tax herein laid.

Section 5. The statement herein required to be made by the distributor, storer or retail dealer shall be sworn to before some officer authorized to administer oaths and any false or fraudulent statement sworn to shall constitute perjury and upon conviction thereof the person so convicted shall be punished as provided by Section 5161 of the Code of Alabama.

Section 6. All distributors, storers, or retail dealers shall keep, for not less than two years, within the State of Alabama at some certain place or office such books, documents or papers as will clearly show the amount of sales or withdrawals of gasoline made in this State covered by this Act.

[fol. 16] Section 7. Within 30 days after the passage of this Act, every distributor, storer or retail dealer engaged in the sale or withdrawal of gasoline shall make a report on blanks furnished by the State Tax Commission showing the place and post office address at which he is engaged in the business of distributor or storer or retail dealer in gasoline, which information shall be entered by the State Tax Commission on a book kept for that purpose, and should such distributor, storer or retail dealer move his place of business from one post office address to another, such distributor, storer, or retail dealer shall within 30 days thereafter notify the State Tax Commission of such removal, giving the former place and post office address and

also the place and post office address to which the business has been removed. After this Act becomes effective no person shall become a distributor, storer or seller of gasoline in this State until he shall have made such report to the State Tax Commission.

Section 8. If any distributor, storer or retail dealer in gasoline in this State covered by the provisions in this Act shall fail to make the reports or any of them, to the State Tax Commission as herein required or shall fail to keep the records required by Section 6 hereof, such distributor, storer or retail dealer shall be guilty of a misdeameanor and upon conviction thereof shall be fined not less than $50.00 nor more than $300.00 for each of such offense.

Section 9. It shall be the duty of the State Tax Commission to enforce the provisions of this Act and the State Tax Commission shall have the right itself or by any of its members or its agents to examine the books, reports and accounts of every such distributor, storer or retail dealer of gasoline covered in this Act.

Section 10. The proceeds of the excise tax levied by this Act shall when collected, be paid into the State Treasury, to the credit of the Public Road and Bridge Fund. All funds so raised shall be primarily charged with the payment of the interest upon such additional highway and bridge bonds, when the same shall have been authorized and sold, and to provide a sinking fund, which shall be sufficient to retire such bonds within a period of thirty-one years. Any of said funds not used and expended for said primary obligations may be used by the State Highway Commission, with the approval of the Governor, in constructing public roads and bridges within the State, as now or hereafter provided by law, and in maintaining the public roads and bridges which have been or may hereafter be constructed by the State Highway Commission, in equipping and preparing convicts for use upon the public roads and bridges of the State, for the maintenance of such convicts while so at work upon such roads and bridges, for compensating the State for the use of such convicts, and for such other use upon the public roads and bridges of the State as may be authorized by the State Commission, with the approval of the Governor. Provided, however, that no

part of said fund shall be expended except in accordance with the law as it now exists or may hereafter be enacted.

Section 11. The acceptance of any money paid for the excise tax provided for in this Act shall in no way preclude the collection of the money actually due, provided however that the money actually paid shall constitute a credit against the money actually due.

Section 12. The forms for all statements and reports required in the provisions of this Act shall be prescribed and furnished by the State Tax Commission and the cost of the enforcement of this Act shall be paid out of the funds derived from the excise tax herein prescribed upon a warrant of the State Auditor upon a voucher of the Chairman of the State Tax Commission and approved by the Governor.

Section 13. If distributor, storer or retail dealer of gasoline covered by this Act shall fail to make the monthly returns prescribed herein the State Tax Commission shall make a return for such delinquent upon such information as it may reasonably obtain, assess the excise tax thereon, and add a penalty for failure to make such return 25 per cent of the tax due, to the amount as assessed by the Commission.

[fol. 17] Section 14. The State Tax Commission shall, as soon as is practicable, and before the 30th day of the month, certify to the State Auditor and the State Treasurer names of all persons liable to pay the tax herein provided together with the post office address and the amount of the tax, and if any such tax and penalties shall not have been paid, the chairman of the State Tax Commission shall issue executions for the collection of such tax directed to any sheriff of the State of Alabama, who shall proceed to collect the same in the manner now provided by law for the collection of delinquent tax by the county tax collectors and make returns of such executions to the State Tax Commission. The tax and all penalties herein provided for shall be held as a debt payable to the State of Alabama by the person against whom the same shall be charged and all such penalties and assessments shall be a lien upon the property in this State of the party charged therewith.

Section 15. Any distributor, storer or retail dealer who shall violate any of the provisions of this Act may be restrained and the proper prosecution instituted in the name of the State of Alabama by its Attorney General or under his direction by any Circuit Solicitor of the State from distributing, selling or withdrawing from storage any gasoline, the sale or withdrawal of which is taxable under this Act, until such person shall have complied with the provisions of this Act.

Section 16. Should any section of this Act or any part of this Act be declared unconstitutional it shall not invalidate the remaining sections thereof.

Section 17. Nothing in this Act shall be held or construed to in any way repeal or change the excise tax now levied and collected and distributed to the counties as provided in the Act approved February 10th, 1923.

Section 18. This Act shall go into effect immediately upon its passage.

Approved Jan. 25, 1927.

[fol. 18] EXHIBIT "B" TO BILL OF COMPLAINT

Be it enacted by the Legislature of Alabama:

Section 1. That as used in this act, the term "Gasoline" shall include gasoline, naptha and other liquir motor fuels or any devices or substitutes therefor commonly used in internal combustion engines, provided that nothing contained in this act shall apply to those products commercially known as "Kerosene Oil", "Fuel Oil", "Crude Oil" used for lighting or heating purposes. The word "persons" means and includes every person, corporation, copartnership, company, agency or association, singular or plural. The term "distributor" shall include any person who shall engage in the selling of gasoline as herein defined in this State by wholesale in domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The term "retail dealer" shall include any person herein defined as "distributor" who is also engaged in the sale of gasoline as herein defined, at any place in this State in broken quantities. The term "storer" as herein

used shall include any person who ships gasoline into this State, in tank quantities and stores the same and withdraws or uses the same for any purpose.

Section 2-A. Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of one cent per gallon in addition to all other excise tax- now imposed by law upon the selling, distributing or withdrawing from storage for any use, gasoline as herein defined in this State; said one cent excise tax shall be collected as now provided by law for the collection of gasoline excise tax and when collected, less the expense of collecting, shall be paid into the State Treasury to the credit of the State Highway Department for the purposes set forth in this Act until October 1, 1932, after which time the same when collected shall be paid to the County Treasurer or the depository of the several counties in equal shares for a period of three years to be used exclusively by said counties in constructing and maintenance of public roads and bridges within the several counties. Where the excise tax herein provided shall have been paid by a distributor or retail dealer or storer, such payment shall be sufficient, the intention being that the tax levied by this Act shall not be paid but once. Provided, however, that at the end of three years period provided for herein for said excise tax to be paid to the counties said excise tax shall thereafter be no longer collected. (b) The tax imposed by subdivision (a) of this section shall apply to persons, firms, corporations, dealers or distributors, storing gasoline and distributing same or allowing the same to be withdrawn from storage, whether such withdrawals be for sales or other use—provided that "sellers" of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and storers and distributors shall compute and pay this tax on the basis of their withdrawals or distribution. (c) The excise tax herein levied is levied by the State under its police power and as an aid to policing, supervising, preserving, maintaining, constructing and regulating the use of public roads and bridges in the State of Alabama and maintaining, guarding and supervising state convicts while working upon such roads and bridges and is not a Revenue measure.

Section 3. On or before the twentieth day of each month after this Act shall have taken effect, every person upon

whom this excise tax is levied shall render to the State Tax Commossion on forms prescribed by such Commission, a true and correct statement of all sales and withdrawals of gasoline made by him or them during the next preceding month, liable for the payment of the excise tax herein described, and shall furnish to said Commission such additional information as such Commission may require upon blanks to be formulated and furnished by said Commission and at the time of making such report shall pay to the State Tax Commission an amount of money equal to the excise tax herein laid. The statement herein required to be made by this distributor, storer or retail dealer shall be sworn to before some officer authorized to administer oaths and any false or fraudulent statement sworn to shall constitute perjury and upon conviction thereof the person so convicted shall be punished as provided by law for the crime of perjury.

[fol. 19] Section 4. All distributors, storers, or retail dealers shall keep, for not less than two years, within the State of Alabama at some certain place or office such books, documents or papers as will clearly show the amount of sales or withdrawals of gasoline made in this State covered by this Act.

Section 5. Within thirty days after the effective date of this Act, every distributor, storer or retail dealer engaged in the withdrawal of gasoline who has not theretofore made such report, shall make a report on blanks furnished by the State Tax Commission to the State Tax Commission showing the place and post office address at which he is engaged in the business of distributor or storer or retail dealer in gasoline, which information shall be entered by the State Tax Commission on a book kept for that purpose, and should such distributor, storer, or retail dealer move his place of business from one post office address to another, such distributor, storer or retail dealer shall within thirty days thereaffer notify the State Tax Commission of such removal, giving the former place and post office address and also the place and post office address to which the business has been removed. After this Act becomes effective no person shall become a distributor, storer or seller of gasoline in this State until he shall have made such reports to the State Tax Commission.

Section 6. If any distributor, storer or retail dealer in gasoline in this State covered by the provisions of this Act shall fail to make the reports or any of them, to the State Tax Commission as herein required or shall fail to keep the records required by Section 4 hereof, such distributor, storer or retail dealer shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than Fifty Dollars nor more than Three Hundred Dollars for each of such offenses.

Section 7. It shall be the duty of the State Tax Commission to enforce the provisions of this Act and the State Tax Commission shall have the right itself or by any of its agents to examine the books, reports and accounts of every such distributor, storer, or retail dealer of gasoline covered in this Act.

Section 8. The proceeds of the excise tax herein imposed by this Act, less the actual cost of the collection of the same, shall, when collected, be paid into the State Treasury to the credit of the Public Road and Bridge Fund to be used by the State Highway Commission, with the approval of the Governor, for the purpose of supervising and maintaining such public roads and bridges as may now be constructed in the State and to hereafter construct, supervise and maintain public roads and bridges under authority and supervision of the State Highway Commission as provided by law; and for the purpose of maintaining and supervising State convicts while working upon such roads and bridges until October 1, 1932, and from thereafter divided equally among the sixty-seven counties of the State; payment to be made to the County Treasurer or depository of said Counties on the tenth day of each month of the year, and said funds shall be used by the several counties of the State exclusively for the construction and maintenance and policing of the public roads in the respective counties. The tax herein imposed shall cease and become inoperative on the first day of October, 1935.

Section 9. The acceptance of any money paid for the excise tax provided for in this Act shall in no way preclude the collection of the money actually due, provided, however, that the money actually paid shall constitute a credit against the money actually due.

Section 10. The forms for all statements and reports required in the provisions of this Act shall be prescribed and furnished by the State Tax Commission and the cost of the enforcement of this Act shall be paid out of the funds derived from the excise tax herein prescribed upon a warrant of the State Auditor upon a voucher of the Chairman of the State Tax Commission and approved by the Governor.

[fol. 20] Section 11. If any distributor, storer or retail dealer, in gasoline covered by this Act shall fail to make the monthly returns prescribed herein, the State Tax Commission shall make a return for such delinquent upon such information as it may reasonably obtain, assess the excise tax thereon, and add a penalty for failure to make such return of twenty-five per cent of the tax due to the amount as assessed by the Commission. If in the opinion of the State Tax Commission a good and sufficient cause and reason is shown for such delinquency, the State Tax Commission may remit the penalty, otherwise the penalty shall be paid. The State Tax Commission shall be authorized and empowered to make return for the delinquent taxpayer upon such information as it may reasonably obtain and add thereto the penalty as provided in this section of this Act. The State Tax Commission shall as soon as practicable, and before the thirtieth day of the month, certify to the State Auditor and the State Treasurer names of all persons liable to pay the tax herein provided, together with the post office address and the amount of the tax and if any such tax and penalties shall not have been paid, the State Tax Commission shall issue executions for the collection of such tax directed to any sheriff of the State of Alabama, who shall proceed to collect the same in the manner now provided by law for the collection of delinquent tax by the county tax collector and make returns of such executions to the State Tax Commission. The tax and all penalties herein provided for shall be held as a debt payable to the State of Alabama by the person against whom the same shall be charged and all such penalties and assessment shall be a lien upon the property in this State of the party charged therewith.

Section 12. Any distributor, storer, or retail dealer, who shall violate any of the provisions of this Act may be restrained and the proper prosecutions instituted in the name of the State of Alabama by its Attorney General or under his direction, by any circuit solicitor of the State, from dis-

tributing, selling or withdrawing from storage any gasoline, the sale of the withdrawal of which is taxable under this Act, until such person shall have complied with the provisions of this Act.

Section 13. Each freight agent of the Railroad or other transportation companies operating in the State af Alabama shall report to the State Tax Commission on the first day of October, January, April and July of each year, all shipments of gasoline or substitutes therefor received at such station on such railroads, or through any other transportation companies, during the preceding three months, giving the name and address of the consignor and consignee shipping and receiving such gasoline or substitutes therefor and the number of gallons or pounds contained in each and every shipment.

Section 14. Nothing in this Act shall be held or construed to in any way repeal or change the excise tax now levied and collected on gasoline under any general or local law heretofore adopted.

Section 14-A. That in the event an amendment to the Constitution authorizing the issue of new or additional bonds for the construction of public roads and highways be ratified, then, in that event a sufficient amount of the tax herein levied and collected shall be applied to the payment of interest on said bonds and to create and provide a sinking fund to pay said bonds.

Section 15. This act with all its provisions shall go into effect immediately upon its passage and approval by the Governor and should any section of this Act, or any provision hereof be declared unconstitutional, it shall not invalidate the remaining sections or parts thereof.

Approved July 27, 1931.

[fol. 21] EXHIBIT "C" TO BILL OF COMPLAINT

Be it Enacted by the Legislature of Alabama:

Section 1. As used in this Act, the term "gasoline" shall include gasoline, naptha and other liquid motor fuels or any devices or substitutes therefor, commonly used in internal

combust-on engines; provided, however, that nothing contained in this Act shall be held to apply to those products known commercially as "kerosene oil", "fuel oil," or "crude oil" used for lighting or heating purposes. The word "person" means and includes persons, corporations, co-partnerships, companies, agencies or associations, singular or plural. The term "distributor" shall include any person who engages in the selling of gasoline in this State by wholesale domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The word "refiner" shall include any person who manufactures, distills, blends, compounds or mixes any one or more products in the production of a liquid motor fuel as herein defined. The term "retail dealer" shall include any person herein defined as distributor who is also engaged in the selling of gasoline in this State at any place in this State in broken quantities. The term "storer" as herein used shall include any person who ships, or causes to be shipped, gasoline into this State in tank or drum quantities and stores the same and withdraws or uses the same for any purpose.

Section 2. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of one cent (1¢) per gallon upon the selling, distributing, or withdrawing from storage for any use gasoline as herein defined in this State, provided however that this excise tax shall not be levied upon the sale of gasoline in interstate commerce, and provided further that where the excise tax of one cent (1¢) per gallon upon the sale of such gasoline shall have been paid by the distributor, refiner, or by retail dealer or storer such payment shall be sufficient, the intention being that the tax shall be paid but once.

Section 3. The excise tax imposed by Section 2 hereof shall apply to persons, firms, corporations, dealers, refiners or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided, that "sellers" of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions.

Section 4. On or before the twentieth day of each month after this act shall have taken effect, every person upon whom this excise tax is levied shall render to the State Tax Commission on forms prescribed by such Commission a true and correct statement of all sales and withdrawals of gasoline made by him or them during the next preceding month, liable for the excise tax herein prescribed, and shall furnish the said Commission such additional information as such Commission may require upon blanks to be formulated and furnished by said Commission, and at the time of making such report shall pay to the State Tax Commission an amount of money equal to the excise herein laid.

Section 5. The statement herein required to be made by the distributor, refiner, storer or retail dealer shall be sworn to before some officer authorized to administer oaths and [fol. 22] any false or fraudulent statement sworn to shall constitute perjury and upon conviction thereof the person so convicted shall be punished as provided by Section 5161 of the Code of Alabama.

Section 6. All distributors, refiners, storers or retail dealers shall keep, for not less than two years, within the State of Alabama at some certain place or office such books, documents or papers as will clearly show the amount of sale or withdrawal of gasoline made in this State covered by this Act.

Section 7. Within thirty (30) days after the passage of this Act every distributor, refiner, storer, or retail dealer engaged in the sale of gasoline, or withdrawal from storage or distribution of gasoline, shall make a report on blanks furnished by the State Tax Commission to the State Tax Commission showing the place and post office address at which he is engaged in the business of distributing, refining, selling at retail, or withdrawing from storage gasoline, which information shall be entered by the State Tax Commission on a book kept for that purpose. After this Act becomes effective, no person shall engage in selling as a distributor or retail dealer, refining or withdrawing from storage, any gasoline covered by the provision of this Act in this State until he shall have made such report to the State Tax Commission.

Section 8. If any distributor, refiner, storer or retail dealer in gasoline in this State covered by the provisions of this Act shall fail to make the reports or any of them, to the State Tax Commission as herein required, or shall fail to keep the records required by Section 6 hereof, such distributor, refiner, storer or retail dealer shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $50.00 nor more than $300.00 for such offence.

Section 9. It shall be the duty of the State Tax Commission to enforce the provisions of this Act and the State Tax Commission shall have the right itself or by any of its members or its agents to examine the books, records and accounts of every such distributor, refiner, storer or retail dealer in gasoline covered by the provisions of this Act. The State Tax Commission shall have the right itself or its agents to examine the records, accounts, book and invoices of any retail dealer who makes purchases from an Alabama distributor, refiner, storer or other retail dealer on a basis of "tax paid"; when, in the opinion of the Commission, such examination is necessary to determine if such gasoline sold in this State has been reported to the gasoline tax department of the State Tax Commission and the tax thereon paid. Any dealer making purchases on the basis of "tax paid" who fails to keep the records as herein required, or refuses to permit the duly authorized agent of the State Tax Commission to examine such records shall be guilty of a misdemeanor and upon conviction thereof, shall be finer not less than fifty dollars ($50.00) nor more than three hundred dollars ($300.00) for each such offence.

Section 10. Subject to the provisions of Section 16½ of this Act the proceeds of the excise tax herein imposed by this Act, less the actual cost of the collection of same, shall, when collected be paid into the State Treasury to the credit of the Public Road and Bridge Fund to be used by the State Highway Commission, with the approval of the Governor, for the purpose of policing, supervising and maintaining such public roads and bridges as may now be constructed in the State and to hereafter, police, construct, supervise and maintain public roads and bridges under authority and supervision of the State Highway Commission, as provided by law.

Section 11. The acceptance of any money paid for the excise tax provided for in this Act shall in no way preclude the collection of the money actually due, provided however that the money actually paid shall constitute a credit against the money actually due.

Section 12. The forms for all statements and reports required under the provisions of this Act shall be prescribed and furnished by the State Tax Commission and the cost of the enforcement of this Act shall be paid out of the funds derived from the excise tax herein prescribed, upon a warrant of the State Comptroller upon a voucher of the Chairman of the Tax Commission, or the State Tax Commissioner and approved by the Governor.

[fol. 23] Section 13. If any distributor, refiner, storer or retail dealer in gasoline covered by this Act shall fail to make the monthly returns prescribed herein and pay the excise tax hereby laid, on or before the 20th day of the month following sale, distribution or withdrawal, the State Tax Commission shall make return for such delinquent upon such information as it may reasonably obtain, assess the excise tax thereon, and add a penalty for failure to make such return and pay the tax herein laid of twenty-five percent (25%) of the tax due, to the amount as assessed by the Commission. If, in the opinion of the State Tax Commission, a good and sufficient cause or reason is shown for such delinquency, the State Tax Commission may remit the penalty, otherwise the penalty shall be paid.

Section 14. Within five (5) days after the State Tax Commission shall adjudge a distributor, refiner, storer or retail dealer in gasoline delinquent, such delinquent shall be notified by the State Tax Commission, by registered mail, to appear before the State Tax Commission and show cause, if any, why execution should not issue against the bond and property of such delinquent to satisfy the amount of tax and penalties due the State. If no showing is made within ten (10) days after notice is mailed, or if such showing is not satisfactory to the State Tax Commission, execution shall be issued by the State Tax Commission for the collection of such tax and penalties, directed to any Sheriff of the State of Alabama, who shall proceed to collect the same in the manner now provided

by law for the collection of delinquent tax by the County Tax Collectors and make return of such executions to the State Tax Commission. The tax and all penalties herein provided for shall be held as a debt payable to the State of Alabama by the person against whom the same shall be charged and all such tax and penalties shall be a superior lien against all the property in this State of the person charged therewith. In the enforcement of collection of delinquent taxes and penalties under the provisions of this Section the Sheriff shall first proceed against the bond of such delinquent and if such bond is insufficient to cover the tax and penalties, then the Sheriff shall proceed against the property of such delinquent.

Section 15. Any distributor, refiner, storer or retail dealer who shall violate any of the provisions of this Act may be restrained and the proper prosecution instituted in the name of the State of Alabama by its Attorney General or under his direction by any Circuit Solicitor of the State, or an attorney employed by the State Tax Commission with the approval of the Governor from distributing, refining, selling or withdrawing from storage any gasoline, the sale or withdrawal of which is taxable under this Act, until such person shall have complied with the provisions of this Act.

Section 16. All other State excise and inspection taxes on the sale of gasoline imposed before the passage of this Act shall remain in full force and effect.

Section 16½. In the event a Court of Competent Jurisdiction shall, for any reason, hold invalid that provision in Act No. 743 being 'An Act to impose, for the use and purpose of supervising, preserving, maintaining, constructing and regulating the use of public roads and bridges in the State of Alabama, and to maintain and supervise State convicts working upon such roads and bridges, an excise tax on all persons, companies, agencies, corporations and associations who sell, distribute, store or draw from storage for any purpose whatsoever, gasoline or any other liquid motor fuels or devices or any substitutes therefor within the State of Alabama; providing for the collection of such excise tax and the payment of same into the State Treasury to the credit of the State Highway Department for the Public Road and Bridge

Fund; providing for the enforcement of this Act and fixing a penalty for the violation of the provisions hereof; providing that the said excise tax so imposed shall be in addition to all other excise tax now imposed by law; and providing that freight agents of Railroads and all agents of all transportation companies operating within the State [fol. 24] of Alabama and who transport motor fuels, shall report to the State Tax Commission all shipments of gasoline or any substitutes therefor, received at any of their Stations within the State,' approved July 27, 1931, providing that the gasoline tax levied in said Act be equally distributed between each of the several counties of the State after October 1, 1932; then and in that event the tax herein levied or imposed shall be, less the actual cost of collecting the same, thereafter divided equally among the sixty-seven counties of the State monthly ac collected, and said funds shall be used by the several counties of the State exclusively for the construction, maintenance, supervision and policing of the public roads in the respective counties.

Section 17. Should any part of this Act be declared unconstitutional it shall not invalidate the remainder thereof.

Section 18. This Act shall take effect on its passage and approval by the Governor.

Approved November 5, 1932.

[fol. 25] EXHIBIT "D" TO BILL OF COMPLAINT

Be it Enacted by the Legislature of Alabama:

Section 1. As used in this Act, the term "gasoline" shall include gasoline, naptha and other liquid motor fuels or any devices or substitutes therefor, commonly used in internal combustion engines; provided, however, that nothing contained in this Act shall be held to apply to those products known commercially as "kerosene oil," "fuel oil" or "crude oil" used for lighting or heating purposes. The word "person" means and includes persons, corporations, co-partnerships, companies agencies or associations, singular or plural. The term "distributor" shall include any person who engages in the selling of gasoline in this State

by wholesale domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The word "refiner" shall include any person who manufactures, distills, blends, compounds or mixes any one or more products in the production of a liquid motor fuel as herein defined. The term "retail dealer" shall include any person herein defined as distributor who is also engaged in the selling of gasoline in this State at any place in this State in broken quantities. The term "storer" as herein used shall include any person who ships or causes to be shipped, gasoline into this State in tank or drum quantities and stores the same and withdraws or uses the same for any purpose.

Section 2. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents (2¢) per gallon upon the gasoline, distributing, or withdrawing from storage for any use gasoline as herein defined in this State, provided however, that this excise tax shall not be levied upon the sale of gasoline in interstate commerce, and provided further that where the excise tax of two cents (2¢) per gallon upon the sale of such gasoline shall have been paid by the distributor, refiner, or by retail dealer or storer such payment shall be sufficient, the intention being that the tax shall be paid but once.

Section 3. The excise tax imposed by Section 2 hereof shall apply to persons, firms, corporations, dealers, refiners, or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided that "sellers" of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions.

Section 4. On or before the twentieth day of each month after this act shall have taken effect, every person upon whom this excise tax is levied shall render to the State Tax Commission on forms prescribed by such Commission a true and correct statement of all sales and withdrawals of gasoline made by him or them during the next

preceding month, liable for the excise tax herein prescribed, and shall furnish the said Commission such additional information as such Commission may require upon blanks to be formulated and furnished by said Commission, and at the time of making such report shall pay to the State Tax Commission an amount of money equal to the excise herein laid.

Section 5. The statement herein required to be made by the distributor, refiner, storer or retail dealer shall be sworn to before some officer authorized to administer oaths and any false or fraudulent statement sworn to shall constitute perjury and upon conviction thereof the person so convicted shall be punished as provided by Section 5161, of the Code of Alabama.

Section 6. All distributors, refiners, storers or retail dealers shall keep, for not less than two years, within the State of Alabama at some certain place or office such books, documents or papers as will clearly show the amount of sale or withdrawal of gasoline made in this State covered by this Act.

Section 7. Within thirty (30) days after the passage of this Act every distributor, refiner, storer, or retail dealer engaged in the sale of gasoline or withdrawal from storage or distribution of gasoline, shall make a report on blanks furnished by the State Tax Commission to the State Tax Commission showing the place and post office address at which he is engaged in distributing, refining, selling at retail, or withdrawing from storage gasoline, which information shall be entered by the State Tax Commission on a book kept for that purpose. After this Act becomes effective, no person shall engage in selling as a distributor [fol. 26] or retail dealer, refining or withdrawing from storage any gasoline covered by the provisions of this Act in this State until he shall have made such report to the State Tax Commission.

Section. 8. If any distributor, refiner, storer or retail dealer in gasoline in this State covered by the provisions of this act shall fail to make the reports or any of them, to the State Tax Commission as herein required, or shall fail to keep the records required by Section 6 hereof, such distributor, refiner, storer or retail dealer shall be guilty of a misdemeanor and upon conviction thereof shall be

fined not less than $50.00 nor more than $300.00 for such offense.

Section 9. It shall be the duty of the State Tax Commission to enforce the provisions of this Act and the State Tax Commission shall have the right itself or by any of its members or its agents to examine the books, records and accounts of every such distributor, refiner, storer or retail dealer in gasoline covered by the provisions of this Act. The State Tax Commission shall have the right itself or its agents to examine the records, account, books and invoices of any retail dealer who makes purchases from an Alabama distributor, refiner, storer or other retail dealer on a basis of "tax paid"; when, in the opinion of the Commission, such examination is necessary to determine if such gasoline sold in this State has been reported to the gasoline tax department of the State Tax Commission and the tax thereon paid. Any dealer making purchases on the basis of "tax paid" who fails to keep the records as herein required, or refuses to permit the duly authorized agent of the State Tax Commission to examine such records shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not less than fifty dollars ($50.00) nor more than three hundred dollars ($300.00) for each such offense.

Section 10. Subject to the provisions of Section 17 of this Act the proceeds of the excise tax herein imposed by this Act, less the actual cost of the collection of same, shall, when collected be paid into the State Treasury to the credit of Public Road and Bridge Fund to be used by the State Highway Commission, with the approval of the Governor, for the purpose of policing, supervising and maintaining such public roads and bridges as may now be constructed in the State and to hereafter police, construct, supervise and maintain public roads and bridges under authority and supervision of the State Highway Commission, as provided by law.

Section 11. The acceptance of any money paid for the excise tax provided for in this Act shall in no way preclude the collection of the money actually due, provided however, that the money actually paid shall constitute credit against the money actually due.

Section 12. The forms for all statements and reports required under the provisions of this Act shall be prescribed and furnished by the State Tax Commission and the cost of the enforcement of this Act shall be paid out of the funds derived from the excise tax herein prescribed, upon a warrant of the State Comptroller upon a voucher of the Chairman of the Tax Commission, or the State Tax Commissioner and approved by the Governor.

Section 13. If any distributor, refiner, storer or retail dealer in gasoline covered by this Act shall fail to make the monthly returns prescribed herein and pay the excise tax hereby laid, on or before the 20th day of the month following sale, distribution or withdrawal, the State Tax Commission shall make return for such delinquent upon such information as it may reasonably obtain, assess the excise tax thereon, and add a penalty for failure to make such return and pay the tax herein laid of twenty-five per cent (25%) of the tax due, to the amount as assessed by the Commission. If, in the opinion of the State Tax Commission, a good and sufficient cause or reason is shown for such delinquency, the State Tax Commission may remit the penalty, otherwise the penalty shall be paid.

[fol. 27] Section 14. Within five (5) days after the State Tax Commission shall adjudge a distributor, refiner, storer or retail dealer in gasoline delinquent, such delinquent shall be notified by the State Tax Commission, by registered mail, to appear before the State Tax Commission and show cause, if any, why execution should not issue against the bond and property of such delinquent to satisfy the amount of tax and penalties due the State. If no showing is made within ten (10) days after notice is mailed, or if such showing is not satisfactory to the State Tax Commission, execution shall be issued by the State Tax Commission for the collection of such tax and penalties, directed to any Sheriff of the State of Alabama, who shall proceed to collect same in the manner now provided by law for the collection of delinquent tax by the County Tax Collectors and make return of such executions to the State Tax Commission. The tax and all penalties herein provided for shall be held as a debt payable to the State of Alabama by the person against whom the same shall be charged and all such tax and penalties shall

be a superior lien against all the property in this State of the person charged therewith. In the enforcement of collection of delinquent taxes and penalties under the provisions of this State the Sheriff shall first proceed against the bond of such delinquent and if such bond is insufficient to cover the tax and penalties, then the Sheriff shall proceed against the property of such delinquent.

Section 15. Any distributor, refiner, storer or retail dealer who shall violate any of the provisions of this Act may be restrained and the proper prosecution instituted in the name of the State of Alabama by its Attorney General or under his direction by any Circuit Solicitor of the State, or an attorney employed by the State Tax Commission with the approval of the Governor from distributing, refining, selling or withdrawing from storage any gasoline, the sale or withdrawal of which is taxable under this Act, until such person shall have complied with the provisions of this Act.

Section 16. All other State excise and inspection taxes on the sale of gasoline imposed before the passage of this Act, except those expressly repealed herein, shall remain in full force and effect.

Section 17. That the proceeds from one cent of the tax herein levied shall be equally divided among the sixty-seven counties of the State of Alabama monthly as collected, less the actual cost of collecting the same, payment to be made to the County Treasurer or Depository of said counties on the 10th, day of each month of the year; and said funds shall be used by the several counties of the State exclusively for the construction, maintenance, supervision and policing of the public roads and bridges in the respective counties; provided, however, that the Board of Revenue or other such governing body of a county may, at any time within twelve months from the passage of this Act, use at their option, subject to the approval of the Governor of the State of Alabama, and of such proceeds as collected for the purpose of matching any United States Government funds on any fair and reasonable basis that may be expended in said county.

Section 18. That the proceeds from one cent of said tax herein levied may be used by the Governor of the State of Alabama at any time within twelve months from the

approval of this Act for the purpose of matching any United States Government funds on any fair and reasonable basis.

Section 19. That the levy of the one cent tax as provided and levied under the provisions of an act entitled "An Act to impose, for the use and purpose of supervising, preserving, maintaining, constructing and regulating the use of public roads, and bridges in the State of Alabama, and [fol. 28] to maintain and supervise State Convicts while working upon such roads and bridges, an excise tax on all persons, companies, agencies, corporations and associations, who sell, distribute, store or draw from storage for any purpose whatsoever, gasoline or any other liquid motor fuels or devices or any substitutes therefor within the State of Alabama; providing for the collection of such excise tax and the payment of same into the State Treasury to the credit of the State Highway Department for the public road and bridge fund; providing for the enforcement of this Act and fixing a penalty for the violation of the provisions hereof; providing that the said excise tax so imposed shall be in addition to all other excise tax now imposed by law; and providing that freight agents of railroads and all agents of all transportation companies operating within the State of Alabama and who transport motor fuels, shall report to the State Tax Commission all shipments of gasoline or any substitutes therefor, received at any of their stations within the State. Approved July 27, 1931, "be and the same is hereby suspended as of and on February 1, 1935, and all other provisions of said act shall remain and be in full force and effect until the full payment of the amount due thereunder is paid in full and thereafter said act is hereby repealed. That the levy of the one cent tax as provided and levied under the provision of an act entitled "An Act to impose an excise tax in addition to any and all other excise taxes now imposed by law on persons, corporation, co-partnerships, companies, agencies or associations engaged in selling, distributing, refining, storing, or withdrawing from storage for any purpose whatsoever gasoline or other liquid motor fuels or devices or substitutes therefor in this state; and providing for the collection and payment of such tax; and for the examination of the books and records of any persons, corporations, co-partnerships, companies, agen-

cies or associations engaged in selling, distributing, refining, storing or withdrawing from storage for any purpose whatsoever gasoline or other liquid motor fuels or devices or substitutes therefor in this state; providing a penalty for any false statements made in making reports to the State Tax Commission; providing for the distribution of the funds derived therefrom, and the use to which such funds may be put; and providing for the enforcement of this act and fixing a penalty for violation of any of the provisions hereof. Approved November 5, 1932," be and the same is hereby suspended as of and on February 1, 1935, and all other provisions of said act shall remain and be in full force and effect until the full payment of the amount due thereunder is paid in full and thereafter said Act is hereby repealed.

Section 20. Shquld any part of this Act be declared unconstitutional it shall not invalidate the remainder thereof.

Section 21. This Act shall take effect on the 31st. day of January, 1935.

Approved January 31, 1935.

[fol. 29] EXHIBIT "E" TO BILL OF COMPLAINT

Schedule 156. As used in this Chapter, the term "Gasoline" shall include gasoline, naptha and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines; provided, however, that nothing in this Chapter shall be held to apply to those products known commercially as "kerosene oil", "fuel oil," or "crude oil" commonly used for lighting, heating or industrial purposes. The word "person" means and includes persons, corporations, copartnerships, companies, counties, municipal corporations, school boards, or agencies of the State, or other agencies, associations, incorporated or otherwise, singular or plural. The term "distributor" shall include any person who engages in the selling of gasoline in this State by wholesale domestic trade, but shall not apply to any transaction of such distributor in interstate commerce. The word "refiner" shall include any person who manufacturers, distills, blends, compounds or mixes any one or more products in

the production of a liquid motor fuel as herein defined. The term "retail dealer" shall include any person herein defined as distributor who is also engaged in the selling of gasoline in this State at any place in this State in broken quantities. The term "storer" as herein used shall include any person who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same for any purpose.

Schedule 156.1. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline as herein defined, provided, however, that this excise tax shall not be levied on the sale of gasoline in interstate commerce, and provided further, that where the excise tax of six cents ($.06) per gallon upon the sale, distribution, storage or withdrawal from storage of such gasoline shall have been paid by a distributor, refiner, or by retail dealer or storer, such payment shall be sufficient, the intention being that the tax shall be paid but once.

Schedule 156.2. The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided that "sellers" of gasoline and its substitute paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions.

Schedule 156.3. On or before the twentieth day of each month after this Chapter shall have taken effect, every person upon whom this excise tax is levied, shall render to the State Tax Commission on forms prescribed by such Commission, a true and correct statement of all sales and withdrawals of gasoline made by him or them during the next preceding calendar month, and shall furnish the said Commission such other information as such Commission may demand and/or require, upon blanks to be formulated and furnished by said Commission, and at the time of making such monthly report shall pay to the State Tax Commission an amount of money equal to the excise tax herein levied.

Schedule 156.4. The monthly statement herein required to be made by the distributor, refiner, storer or retail dealer shall be sworn to before some officer authorized to administer oaths and any false or fraudulent statement sworn to shall constitute perjury and upon conviction thereof, the person so convicted shall be punished as provided by Section 5161 of the Code of 1923.

Schedule 156.5. All distributors, refiners, storers or retail dealers shall keep, for not less than two years, within the State of Alabama at some certain place or office, such books, documents or other papers as will clearly show the amount of sales, distributions or withdrawals of gasoline made in this State covered by this Chapter.

[fol. 30] Schedule 156.6. Within thirty days after the passage of this Chapter, every distributor, refiner, storer or retail dealer engaged in the sale or withdrawal of gasoline shall make a report on blanks furnished by the State Tax Commission to the State Tax Commission showing the place and post office address at which he is engaged in the business of distributor, refiner, or storer or retail dealer in gasoline, which information shall be entered by the State Tax Commission on a book kept for that purpose, and should such distributor, refiner, storer or retail dealer move his place of business and/or his post office address, to another such distributor, refiner, storer or retail dealer shall, without delay and/or within twenty days thereafter, notify the State Tax Commission of such removal, giving the former place and post office address and also the place and post office address to which the business has been removed. After this Chapter becomes effective no person shall become a distributor, refiner, storer or seller of gasoline in this State until he shall have made such reports to the State Tax Commission.

Schedule 156.7. If any distributor, refiner, storer or retail dealer in gasoline in this State, covered by the provisions of this Chapter, shall fail to make the reports or any of them, to the State Tax Commission as herein required, or shall fail to keep the records as herein required, such distributor, refiner, storer or retail dealer shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than Fifty Dollars ($50.00) nor more than Three

Hundred Dollars ($300.00) for such offence. Each month of such failure shall constitute a separate offence.

Schedule 156.8. It shall be the duty of the State Tax Commission to enforce the provision of this Chapter and the State Tax Commission shall have the right by itself or by any of its members or its agents to examine the books, records and accounts of every such distributor, refiner, storer or retail dealer in gasoline covered by the provisions of this Chapter, and any distributor, refiner, storer, or retail dealer who refuses to permit the examination of such records, accounts or books shall be guilty of a misdemeanor and upon conviction fined not less than Fifty Dollars ($50.00) nor more than Three Hundred Dollars ($300.00). The State Tax Commission shall have the right itself, by any of its members, or its agents to examine the records, accounts, books and invoices of any retail dealer or storer who makes purchases of gasoline from an Alabama distributor, refiner, storer or other retail dealer or from any other source on a basis of "tax paid" when, in the opinion of the Commission such examination is necessary to determine if such gasoline sold in this State has been reported to the gasoline tax department of the State Tax Commission and the tax thereon paid. Any dealer or person making purchases on the basis of "tax paid" from any licensed dealer or otherwise, who fails to keep the records as herein required, or refuses to permit the duly authorized agents of the State Tax Commission to examine such records shall be guilty of misdemeanor and upon conviction therefor, shall be fined not less than Fifty Dollars ($50.00) nor more than Three Hundred Dollars ($300.00) for each such offence.

Schedule 156.9. One-third of the proceeds of the excise tax herein imposed, less cost of collection and administering this Chapter, shall be paid into the State Treasury to the credit of the sixty-seven counties of the State, and shall be divided and distributed equally among the sixty-seven counties of this State, payment to be made by State warrant to be mailed to the Treasurer of such counties or depositories of such counties, on or before the 10th day of each month following collection. Such funds when received by the County Treasurer shall be covered into the County road and bridge fund, and shall be expended exclusively in the construction, maintenance and repair of the public roads

and bridges in such County. The use or expenditure of any said funds in any other manner or for any other purpose than as provided herein, but the governing body of any County of any individual member of said body, shall constitute a misdemeanor puishable by fine of not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00) and by imprisonment in the County jail or at hard labor for the County for not less than one or more than twelve months. The State Highway Commission shall have the right to inspect the work upon which such funds [fol. 31] are expended, and if in the judgment of the State Highway Commission, it appears that such funds are not being expended profitably or correctly; tne State Highway Commission shall report the matter to the State Comptroller or other office required to examine the records of County Officials. The State Comptroller, or other officer required to examine the records of county officials, is hereby especially charged with the duty of examining into and determining each year whether or not such funds have been used or expended as herein provided. Whenever such officer discovers a violation of any provision of this sub-section, he shall forthwith report same to the Attorney General whose duty it shall be to direct the prosecution of said offense. Provided, however, that in the use and expenditure of that portion of the funds accruing hereunder to Conecuh County, the Board of Revenue of Conecuh County shall have authority to apply 40% of such funds to the purposes provided in Act approved June 16, 1931 (Local Acts 1931, page 128), this being a new levy of the same tax referred to in said local act and it not being the intention to repeal said local act, any provision herein contained to the contrary notwithstanding.

Schedule 156.10. One-third of the proceeds of the excise tax herein imposed, when collected, shall be covered into the State Treasury to the credit of the public road and bridge fund. Such funds shall be primarily charged with the payment of interest and retirement of public road and bridge bonds issued in accordance with the provisions of an amendment to the State Constitution approved by the voters of Alabama at an election held on April 12th, 1927, authorizing the issuance of highway and bridge bonds in the aggregate amounting to Twenty-five Million Dollars ($25,000,000.00). After paying interest on these bonds, a

sufficient sum shall be set aside as a sinking fund, to retire these bonds as they become due. Any residue of such fund, after provision shall have been made for the primary obligations herein set out, may be used by the Highway Commission, with the approval of the Governor, in constructing public roads and bridges within the State as now or may hereafter be provided by law, and in maintaining the public roads and bridges which have been or may hereafter be constructed by the State Highway Commission; in equipping and preparing convicts for use upon the public roads and bridges of this State; for maintenance of such convicts while so at work upon such roads and bridges; for compensating the State for the use of such convicts, and after the payment of the primary obligations the interest on the bonds issued under authority of Act No. 292 approved August 31, 1927, Acts 1927, page 278, may be paid out of the residue of the receipts of the gasoline tax collected by the State under this sub-section, after there has been taken from this fund the amount necessary to meet all of the primary purposes to which said gasoline tax fund is pledged under Article XX A, as an amendment to the Constitution of the State, and for such other use upon the public roads and bridges of this State as may be authorized by the Highway Commission with the approval of the Governor. Provided, however, that the residue of such fund shall not be expended contrary to law as it now exists or may hereafter be enacted.

Schedule 156.11. One-third of the excise tax herein imposed, when collected, shall be divided, monthly as collected, less the cost of collection, as follows: One half of said 1/3 shall be paid into the State Treasury to the credit of the State Highway Department for the public road and bridge fund, as provided by Sections 18 and 19 of an Act No. 19 of Legislature of Alabama, approved January 31, 1935, which said sections are made a part of this section and read as follows: Section 18. That the proceeds from one cent of said tax herein levied may be used by the Governor of the State of Alabama at any time within twelve months from the approval of this Act for the purpose of matching any United States Government funds on any fair and reasonable basis. Section 19. That the levy of the one cent tax as provided and levied under the provisions of an Act entitled 'An Act to Impose, for the use and purpose of

supervising, preserving, maintaining, constructing and regulating the use of public roads, and bridges in the State of Alabama, and to maintain and supervise State Convicts while working upon such roads and bridges, an excise tax on all persons, companies, agencies, corporations and associations who sell, distribute, store or draw from storage for any purpose whatsoever, gasoline or any other liquid motor fuels or devices or any substitutes therefor within the State of Alabama; providing for the collection of such [fol. 32] excise tax and the payment of same into the State Treasury to the credit of the State Highway Department for the public road and bridge funds, providing for the enforcement of this act and fixing a penalty for the violation of the provisions hereof; providing that the said excise tax so imposed shall be in addition to all other excise tax now imposed by law; and providing that freight agents of railroads and all agents of all transportation companies operating within the State of Alabama and who transport motor fuels, shall report to the State Tax Commission all shipments of gasoline or any substitute therefor, received at any of their stations within the State. Approved July 27, 1931, 'be and the same is hereby suspended as of and on February 1, 1935, and all other provisions of said act shall remain and be in full force and effect until the full payment of the amount due thereunder is paid in full and thereafter said act is hereby repealed. That the levy of the one cent tax as provided and levied under the provisions of an act entitled 'An Act to impose an excise tax in addition to any and all other excise taxes now imposed by law on persons, corporations, co-partnerships, companies, agencies or associations engaged in selling, distributing, refining, storing or withdrawing from storage for any purpose whatsoever gasoline or other liquid motor fuels or devices or substitutes therefor in this State, and providing for the collection and payment of such tax; and for the examination of the books and records of any person, corporation, co-partnerships, companies, agencies or associations engaged in selling, distributing, refining, storing or withdrawing from storage for any purpose whatsoever or other liquid motor fuels or devices or substitutes therefor in this State; providing a penalty for any false statements made in making reports to the State Tax Commission; providing for the distribution of the funds derived therefrom,

and for the use to which such funds may be put, and providing for the enforcement of this act and fixing a penalty for violation of any of the provisions hereof. Approved November 5, 1932, be and the same is hereby suspended as of and on February 1, 1935, and all provisions of said act shall remain and be in full force and effect until the full payment of the amount due thereunder is paid in full and thereafter said Act is hereby repealed; "and the other one-half of said 1/3 shall be divided equally among the 67 counties of the State of Alabama, monthly as collected, less the cost of collection, payment to be made to the County Treasurer or Depository of said counties on or before the 10th day of each month of the year, and said funds shall be used by the several counties of the State exclusively for the construction, maintenance, supervision and policing of the public roads and bridges in the respective counties; provided, however, that the Board of Revenue or other such governing body of a county may direct the State Tax Commission to pay over to the State Highway Department such part of said funds as may be agreed upon by the Board of Revenue or such other governing body of any county, and the Governor of the State of Alabama, which said funds are to be used in the construction and maintenance of roads in said county, to be agreed upon by the Board of Revenue of such county, or such other governing body, and the Governor of the State of Alabama.

Schedule 156.12. The acceptance of any money paid for the excise tax provided for in this Chapter shall in no way preclude the collection of the money actually due, provided, however, that the money actually paid shall constitute a credit against the money actually due.

Schedule 156.13. The forms for all statements and reports required under the provisions of this Chapter shall be prescribed and furnished by the State Tax Commission and the cost of the enforcement of this Chapter shall be paid out of the funds derived from the excise tax herein prescribed, upon a warrant of the State Comptroller upon a voucher of the State Tax Commission, and approved by the Governor.

Schedule 156.14. If any distributor, refiner, storer or retail dealer in gasoline covered by this Chapter shall fail to make the monthly returns prescribed herein and pay

the excise tax hereby laid, on or before the 20th day of [fol. 33] the month following sale, distribution or withdrawal, the State Tax Commission shall make return for such delinquent upon such information as it may reasonably obtain, assess the excise tax thereon, and add a penalty for failure to make such return and pay the tax herein le-i-d of twenty-five per cent (25%) of the tax due, to the amount as assessed by the Commission. If, in the opinion of the State Tax Commission, a good and sufficient cause or reason is shown for such delinquency, the State Tax Commission may remit the penalty, otherwise the penalty shall be paid.

Schedule 156.15. Within five (5) days after the State Tax Commission shall adjudge a distributor, refiner, storer or retail dealer in gasoline delinquent, such deliquent shall be notified by the State Tax Commission, by registered mail, to appear before the State Tax Commission and show cause, if any, why execution should not issue against the bond and property of such delinquent to satisfy the amount of the tax and penalties due the State. If no showing is made within ten (10) days after notice is mailed, or if such showing is not satisfactory to the State Tax Commission, execution may be issued by the State Tax Commission for the collection of such tax and penalties directed to any Sheriff of the State of Alabama, who shall proceed under such execution in the manner now provided by law under the executions issued from courts of record, and shall make return of such executions to the State Tax Commission within thirty days of the issuance thereof. The Tax and all penalties herein provided for shall be held as a debt payable to the State of Alabama by the person against whom the same shall be charged and all such tax and penalties shall be a lien against all the property in this State of the person charged therewith, superior to all other liens except tax liens to the State antecedent in date.

Schedule 156.16. In the enforcement of collection of taxes and penalties imposed by the terms of this Chapter, the Sheriff to whom an execution is issued by the State Tax Commission shall first levy upon all the property of the person against whom the tax is levied, and then make formal demand upon the bonding company for payment to the amount of the bond. If such sum as may be collected from the bonding company is insufficient, then in that event the Sheriff shall proceed to sell the property so levied upon,

and apply the proceeds first to the payment of the balance due on the excise taxes and cost involved in making such levy and sale, the residue to be paid over to the person against whom the execution is issued.

Schedule 156.17. The State Tax Commission is hereby authorized to prepare a claim against any distributor, refiner, storer, or retail dealer adjudged delinquent in payment of gasoline excise taxes and have such claim recorded in the office of the Judge of Probate of the County in which such person is doing business, or in the County where such person maintains his or their main place of business. Said claim shall be in the form of a decree by the State Tax Commission and shall set forth the amount of tax due by the person adjudged delinquent, and the penalty imposed thereon. When such claim shall have been paid the State Tax Commission shall write or cause to be written on such record the word "satisfied."

Schedule 156.18. Any distributor, refiner, storer, or retail dealer who shall violate any of the provisions of this Chapter may be restrained and the proper prosecution instituted in the name of the State of Alabama by its Attorney General or under his direction by any Circuit Solicitor of the State, or any attorney employed by the State Tax Commission with the approval of the Governor and the Attorney General, from distributing, refining, selling or withdrawing from storage any gasoline, the sale or withdrawal of which is taxable under this Chapter, until such person shall have complied with the provisions of this Chapter.

Schedule 156.19. Should any section, clause, paragraph, line, sentence or part of this Chapter be declared unconstitutional, it shall not invalidate the remaining sections or parts thereof, the Legislature hereby declaring that it [fol. 34] would have passed the remainder of said Chapter irrespective of such invalid section, clause, paragraph, line, sentence or part.

Schedule 156.20. All laws and parts of laws in conflict with the provisions of this Chapter are hereby repealed, provided that nothing in this Chapter shall be held or construed to repeal any part of Act 55, approved October 5th, 1932, Acts, Special Session, 1932, page 57. Provided further that nothing herein contained shall be held or con-

strued to repeal any law heretofore enacted providing for the collection of excise tax on the sale, distribution or withdrawal of gasoline from storage in this State until all such taxes accrued prior to the effective date of this Chapter shall have been collected.

[fol. 35] EXHIBIT "F" TO BILL OF COMPLAINT

August 22, 1928.

The State Tax Commission, Capitol.

DEAR SIRS:

Construction of Act No. 62, 1923, page 36 and of Act No. 3, Acts, 1927, page 790, as amended by Act No. 340, Acts, 1927, page 326, as applied to sales of gasoline to United States.

Opinion by Assistant Attorney General Evans

Receipt of your letter of June 1st, 1928, is hereby acknowledged. You wish to know if, in view of the decision of the United States Supreme Court, in the case of the Panhandle Oil Co. vs. The State of Mississippi, Supreme Court Reporter, Vol. 48, page 451 et seq., the opinion rendered by Hon. Harwell G. Davis, former Attorney General, of date June 13th, 1923, upholding the right of the State of Alabama to collect Gasoline tax provided for by Act No. 62, Acts, 1923, page 36, et seq., when gasoline is sold to an instrumentality of the Government of the United States, is tenable. In other words, is the method of taxation, as applied to gasoline, in this State, so materially different from that of the State of Mississippi that the tax may be collected when gasoline is sold in this State to the United States Government, while the tax provided by the law of the State of Mississippi may not be collected, because it conflicts with the Constitution of the United States.

In reply will say that the reasons given in said opinion by the Supreme Court of the United States for the unconstitutionality of the Mississippi law, as applied to sales of gasoline to the United States by a distributor, apply with equal force to the statutes of the State of Alabama, whether the Act of 1923, or that of 1923, as amended Acts, 1927, page 326, et seq.

The tax levied by the State of Alabama, as far as necessary here to quote, is as follows:

"Section 3. (a). Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the selling, distributing, or withdrawing from storage, for any use, gasoline as defined in this state; provided, however, that this excise tax shall not be levied upon the sale of gasoline in interstate commerce; and provided, further, that where the excise tax of two cents per gallon upon the sale of such gasoline shall have been paid by a distributor or by a retail dealer or storer such payment shall be sufficient, the intention being that the tax shall not be paid but once."—Acts, 1927, page 327.

The part of the Mississippi law quoted in the opinion of the Supreme Court of the United States, and upon the effect of which the opinion is based, reads as follows:

"Any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1 cent per gallon upon the sale of gasoline * * * except that sold in interstate commerce or purchased outside of the State and brought in by the consumer for his own use."

The reason given by the Supreme Court of the United States why such Mississippi tax could not be made to apply to sales made by a distributor or retail dealer to the United States are as follows:

[fol. 36] "The sale made by a Mississippi dealer to the United States for the use of its Coast Guard Fleet in service of the Gulf of Mexico and its Veterans' Hospital at Gulfport. The Supreme Court, in said opinion, says:

'The United States is empowered by the Constitution to maintain and operate the fleet and hospital. That authorization and laws enacted pursuant thereto are supreme, and in case of conflict, they control state enactment.'

"The States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions."

"The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to

make sales to the United States was not given by the State and does not depend on the State laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not levy a tax upon transactions by which the United States secures the things desired for its governmental purposes."

"The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests."

"The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. To use the number of gallons sold the United States as a measure of the privilege tax is, in substance and legal effect, to tax the sale. And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State.

"The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled."

In the above quotations from the opinion of the Supreme Court of the United States, I have omitted citations of opinions therein used as being unnecessary for the purpose at hand.

The tax levied by the State of Alabama is "an excise tax of two cents per gallon upon the selling, distributing or withdrawing from storage for any use." The tax levied by the State of Mississippi is that "any person engaged in the business of distributing gasoline or retail dealer in gasoline shall pay for the privilege of engaging in such

business an excise tax of one cent per gallon upon the sale of gasoline."

It is quite evident, when the reasons given by the United States Supreme Court are considered, that such reasons are as applicable to the Alabama law as to the Mississippi law. When a sale is made by a distributor, retail dealer or storer of gasoline to the United States, whether Alabama or Mississippi no tax can be collected on such sale from either the seller or purchaser, and no tax can be exacted of the seller measured by the number of gallons of gasoline so sold.

[fol. 37] Mississippi taxes the business with a tax measured by the number of gallons sold, while Alabama taxes the sale of each gallon sold at two cents per gallon. Alabama also taxes the distributing or withdrawing from storage for any use. It taxes but once, and where there is a sale, the tax is on the sale. Where there is no sale, but a distribution or withdrawing from storage for some use, other than selling, there is a tax on such withdrawal or distribution. We are not here considering such withdrawals, but only sales to the United States.

If the sale, in any case, is not, in effect, a sale to the United States, then, the reasons given in said opinion do not apply and the tax should be collected, unless exempt for some other reason.

When a distributor, retail dealer or storer of gasoline claims a reduction in his tax by reason of some of the sales having been made to the United States, the burden is upon him to satisfy the Tax Commission that the sales, for which reduction is claimed, were in fact, or effect, to the United States.

It will be noticed from reading the excerpts of the said opinion by the Supreme Court of the United States, that said Court had to cogitate to reach the conclusion that the Mississippi tax "is, in substance and legal effect, to tax the sale," which it concludes is not admissible on sales to the United States. The Alabama tax is, in its very words, a tax upon the sale, where sales are made; while Attorney General Davis had to cogitate to reach the conclusion that the Alabama tax "is a privilege or license tax for engaging in the business of selling gasoline." In other words the Supreme Court of the United States construed the Mississippi law to mean exactly what is stated in the Ala-

bama law, while Mr. Davis construed the Alabama law to mean exactly what is stated in the Mississippi law. The Supreme Court of the United States held that while the Mississippi statute purports to be a privilege tax for engaging in the business of selling gasoline it "is, in substance and legal effect, to tax the sale." On the other hand Mr. Davis held that while the Alabama law purports to be a tax on the sale of gasoline, it is, in substance and legal effect, a privilege tax for engaging in the business of selling gasoline, and for that reason it does not matter to whom the gasoline is sold.

Both laws are, in effect, the same when applied to sales to the United States.

I, therefore, conclude that the said opinion handed down by the Supreme Court of the United States is in conflict with the opinion given by Hon. Harwell G. Davis of date June 13th, 1923, to Hon. F. C. Marquis, Associate Member, State Tax Commission, and that said opinion by the former Attorney General is no longer tenable.

In this opinion I have quoted from and discussed the Alabama Act of 1927, as the Act of 1923, the Act construed by Mr. Davis, is plainly a tax on the sale of gasoline and nothing more or less.

Yours truly, Charlie C. McCall, Attorney General.

[fol. 38] EXHIBIT "G" TO BILL OF COMPLAINT

November 22, 1928.

Hon. Jno. G. Sargent, Attorney General, Washington, D. C.

DEAR SIR:

On sales of motor fuels to United States, by dealers in Alabama no tax exacted. Where such tax has been paid in past, Alabama has no law by which refund can be made.

Opinion by Assistant Attorney General Evans

Receipt of your letter of November 9th is acknowledged. You ask if any administrative procedure has been established by the State authorities exempting from tax, motor vehicle fuels sold to the United States by dealers who are accountable to the State for the tax, the date when the

procedure became effective, and whether claims for the refundment of taxes heretofore erroneously collected will be allowed if properly supported by evidence of payment, and what should be made in such claims.

In reply will say that after decision by the Supreme Court of the United States in the case of Panhandle Oil Company vs. State of Mississippi, all such dealers in this state made objection to further payment of such tax on sales made by them to the United States. Thereupon, the State Tax Commission of Alabama asked the opinion of this office as to whether such dealers were liable under the Alabama law on sales to the United States. This office gave the opinion that there was no tax intended under the Alabama law on such sale. As I am informed, by the State Tax Commission, no such tax has been collected or requested since the decision in the Panhandle case.

While the State of Alabama has some statutes providing for refunding certain taxes erroneously paid, in my opinion, none of such statutes apply in case of the tax in question. If refund is made, the Legislature will have to make provision for such refund.

Yours truly, Charlie C. McCall, Attorney General.

[fol. 39] EXHIBIT "II" TO BILL OF COMPLAINT

July 5, 1935.

Hon. Henry S. Long, President, State Tax Commission, Capitol:

DEAR SIR:

The aggregate tax imposed by the several gasoline excise tax statutes is a privilege tax upon the storage and consequent withdrawal from storage, of gasoline, which tax accrues upon amount at the time of withdrawal from storage, and it is the mandatory duty of refiners, storers and distributors to compute and pay the tax as applicable to them on the basis of their withdrawals from storage. In computing and paying the several amounts of tax due by them, distributors, refiners, retail dealers, and storers are not entitled to deduct from the basis of computation a number of gallons equal to the number of gallons of gasoline

withdrawn from storage by them and sold to the United States Government in Alabama.

Opinion by Assistant Attorney General Bibb

I wish to acknowledge receipt of your letter of June 3, 1935, as follows:

"Your opinion is desired on the following questions by this department:

"1. Is the tax imposed by the gasoline excise statutes, (Acts 1923, p. 36; Acts 27, p. 16; Acts 1931, p. 859; Acts 1932, p. 314) a tax upon the sale of gasoline in this State, or a tax upon the withdrawal of gasoline from storage in this State?

"2. Is it mandatory for refiners, storers and distributors to compute and pay this tax on the basis of their withdrawal?

"3. If the refiner, storer and distributor must compute and pay this tax on the basis of their withdrawals, does the tax accrue at the time of the withdrawal from storage for wholesale trade or at the time of the withdrawal for delivery to retail dealers?

"4. If the tax is a tax upon gasoline withdrawn from storage in Alabama, is a distributor, refiner, retail dealer, or storer of gasoline exempt from payment of this tax upon gasoline sold to the United States Government in Alabama?"

The pertinent provisions of the several gasoline excise tax acts referred to are as follows:

Acts of 1923, p. 36 as amended by Acts of 1927, p. 326, provides as follows:

[fol. 40] "Section 2. Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the selling, distributing or withdrawing from storage for any use gasoline as herein defined in this State, provided however that this excise tax shall not be levied upon the sale of gasoline in interstate commerce, and provided further that where the excise tax of two cents per gallon upon the sale of such gasoline shall have been paid by a distributor or by a retail dealer

or storer such payment shall be sufficient, the intention being that the tax shall not be paid but once. (b) The excise tax imposed by subdivision (2) of this section shall apply to persons, firms, corporations, dealers or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals be for sales or other use—provided that 'sellers' of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

An additional excise tax at the rate of two cents per gallon was added by Acts 1927, p. 16, Sections 2 and 3 of which are together identical with Section 2 of Acts of 1923 as amended by Acts of 1927, page 326 as quoted above. Acts of 1931, p. 859 (No. 743) adopting the same definitions used in the prior acts above referred to levied an additional excise tax of one cent per gallon, using language, Sec. 2-A (b) identical with the language of Sec. 2 (b) of said Acts of 1923 as amended.

Acts of 1932, p. 314, adopts the same definitions as embraced in the other acts referred to, adds the term "refiner" as "any person who manufactures, distills, blends, compounds or mixes any one or more products in the production of a liquid motor fuel as herein defined," levies an additional tax equal to one cent per gallon in language identical with that quotation above set out, and provides in Section 3:

"Sec. 3. The excise tax imposed by Section 2 hereof shall apply to persons, firms, corporations, dealers, refiners, or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided, that 'sellers' of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

With this review of and quotation from the several legislative enactments in mind, we may now consider your questions in the order set out.

Answering your question (1), it is my opinion that the aggregate tax levied by these several enactments constitutes essentially an excise or privilege tax upon the storage, and the consequent withdrawal from storage, of gasoline in this State. The intention of the legislature is made quite clear by the repeated use in each of the acts of the language, "the excise imposed by Section — hereof shall apply to persons, firms, corporations, dealers (refiners) or distributors *storing gasoline and distributing the same or* [fol. 41] *allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use.*" This interpretation has been placed upon these several enactments by the Supreme Court of Alabama in State v. City of Montgomery, 228 Ala. 93, 151 So. 856, wherein, after reciting the legislative history of these several acts, the Court said:

"The acts in question imposed a tax upon a storer as well as a distributor or retail dealer. We think this is true, though it is not due until it is withdrawn from storage and is measured by the amount so withdrawn rather than the amount placed in storage. True, it may leak out, waste out of storage or may explode, and thereby and to that extent no tax is payable; *but the whole of the acts taken together show, we think, that the purpose is to impose the tax on the storage* though measured by the amount withdrawn; and then it becomes due to be paid." (Emphasis supplied.)

Again these statutes were construed by the Court of Appeals, fifth circuit, in Pan-American Petroleum Corporation v. State of Alabama, 67 Fed. (2d) 590, wherein the court said:

"In our opinion, it (the tax) *is payable upon the withdrawal of gasoline from storage within the state,* because by the very language of the statute the tax imposed applies to dealers, distributors and storers, the moment they withdraw it from storage, whether the withdrawal be for sale or other use." (Emphasis supplied.)

An almost identical enactment by the Legislature of Tennessee was so construed in Foster & Creighton Company v. Graham, 285 S. W. 570 (Tenn. 1926).

Answering your question (2), it is my opinion that under these several acts, it is mandatory that refiners, storers and distributors compute and pay the several taxes levied upon them upon the basis of their withdrawals from storage.

It will also be noted that the pertinent provision, which appears in all of these several acts referred to, is "provided that 'sellers' of gasoline and its substitutes paying the tax herein provided *may* pay the same computed and paid on the basis of their sales as hereinafter required and storers and distributors *shall compute* and *pay* this tax on the basis of their withdrawals or distribution." Acts of 1927, p. 16, Sec. 3; Acts of 1927, p. 326, Sec. 3 (b); Acts of 1931, p. 859 (No. 743), Sec. 2-A; Acts of 1932, p. 314, Sec. 3. The use of words "may" and "shall" is made significant in these provisions. As a general rule, the word "may" when used in a statute is permissive only, and operates to confer discretion, while the word "shall" is imperative. 59 C. J. 1079, Sec. 635; Coleman v. Eutaw, 157 Ala. 327, 47 So. 703.

There is no ambiguity in this language, and the decisions cited and quoted from above sufficiently disclose the Court's recognition of this mandatory effect of the language used with regard to storers and distributors and in Acts of 1932 with regard to refiners.

In answer to your question (3), it is my opinion that the tax imposed by the several acts accrues upon and at the time of withdrawal from storage, and whether the withdrawal is actually made for wholesale or retail trade or for other use is immaterial.

As was said further in State v. City of Montgomery, 228 Ala. 93, 151 So. 856, above quoted from.

"Since the *privilege of storing* is the basis of the tax, and [fol. 42] for that purpose an excise tax may be levied, it is not controlled by Section 91 of the Constitution, and it is immaterial to what use it (gasoline) is put after it is withdrawn from storage."

The quotation from Pan-American Petroleum Corporation v. State of Alabama, 67 Fed. (2d) 590, above set out in answering question (1) is here pertinent, and also this further quotation from that case, page 591:

"That a state has the power to levy an excise tax upon the withdrawal of gasoline from storage regardless of the

use to which it is put, and even though it be consumed in the generation of active power for carrying on interstate commerce, is settled by the decision of the Supreme Court in Edelson v. Baling Air Transport, 289 U. S. 249, 53 S. Ct. 591, 77 L. Ed. 1155."

It will be observed that the time for the payment of the amounts of such excise tax as shall have accrued is fixed in each act in the same manner. By Section 4 of Acts of 1927, p. 16, Section 4 of Acts of 1927, p. 326, Section 3 of Acts of 1931, p. 859 (No. 743) and Section 4 of Acts of 1932, p. 314 (No. 324) it is provided:

"Section 4. On or before the twentieth day of each month after this act shall have taken effect, every person upon whom this excise tax is levied shall render to the State Tax Commission on forms prescribed by such commission a true and correct statement of all sales and withdrawals of gasoline made by him or them during the next preceding month, liable for the excise tax herein prescribed, and shall furnish the same Commission such additional information as such Commission may require upon blanks to be formulated and furnished by said Commission, and at the time of making such report shall pay to the State Tax Commission an amount of money equal to the excise tax herein laid."

With further reference both to questions (2) and (3), it is perhaps appropriate here to point out that the term "refiner" was first introduced in the definitions and classifications contained in these Acts by the act approved November 5, 1932, Acts of 1932, p. 314 (No. 324) which levied the most recent additional tax equal to one cent per gallon, and is there defined in Section 1 as "any person who manufactures, distills, blends, compounds or mixes any one or more products in the production of a liquid motor fuel as herein defined." Your attention is directed to an opinion of this office dated May 6, 1932, Biennial Report of Attorney General 1930-1932, p. 828, wherein after treating the matter in detail, it was ruled that a "refiner of gasoline in Alabama is a manufacturer and as such is not subject to the gasoline taxes required of distributors, retail dealers and storers under the several Acts of 1923, 1927 and 1931, more particularly referred to above. It therefore follows that "refiners" are embraced only in the Act of 1932, and the tax there levied, and the computation and accrual of the taxes

due from such refiners is to be determined only to the extent and in the amount required by that Act.

I take it that by your question (4), you mean to inquire whether a distributor, refiner, retail dealer, or storer of gasoline, in computing and paying the taxes imposed by the several acts heretofore referred to, has a right to deduct from the basis of computation of the tax a number of gallons equal to the number of gallons of gasoline withdrawn from storage by him and actually sold to the United States [fol. 43] Government within the State of Alabama.

My answer is in the negative. This question is essentially whether the several acts above referred to, with respect to any purchases of gasoline in this State by the United States, operate as a tax on the United States, or its constitutional agencies, directly or in such a manner as to retard, impede or burden the exertion by the United States of its Constitutional powers. That a state has not the power to tax the Federal Government or any of its constitutional agencies is too fundamental in the jurisprudence of this Country to require citation of authority here. In my opinion, these acts do not so operate.

In this connection it is essential to bear in mind that the taxes levied by these several acts are not property taxes upon gasoline; they are not taxes upon the sale of gasoline; but by express terms of the statutes and by judicial construction, they are taxes upon the privilege of storing gasoline. Acts cited above; State v. City of Montgomery, 228 Ala. 93, 151 So. 836.

The leading authority on the question of the effect of state taxes on the sale of gasoline as applied to purchases thereof by the United States Government in such state, is the decision of the Supreme Court of the United States in Panhandle Oil Company vs. State of Mississippi, 277 U. S. 218, 48 S. Ct. 451, L. ed. 857, 56 A. L. R. 583. That case arose as an action by the State of Mississippi to collect a license tax from the oil company upon the sale of gasoline to the United States for the use of its coast guard fleet and its Veterans' Hospital at Gulfport. The laws of Mississippi provided that "any person engaged in the business of distributing gasoline or retailers dealers in gasoline, shall pay for the privilege of engaging in such business an excise tax of one cent per gallon *upon the sale of gasoline,*" with certain ex-

ceptions not here material. In holding the company not liable for the tax upon the sales in question, the Court used the following language, which I will set out at some length in order that the distinction between the facts and statute there dealt with and the conditions obtaining under our statutes may be more clearly apparent. It was there said:

"The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales of the government. Wagner v. Covington, 251 U. S. 95-102, 64 L. ed. 157, 40 Sup. Ct. Rep. 93. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. M'Colloch v. Maryland, supra, 436 (4 L. ed. 608); Gillespie vs. Oklahoma, supra, 505 (66 L. ed. 340, 42 Sup. Ct. Rep. 171); Jaybird Min. Co. vs. Weir, 271 U. S. 609, 613, 70 L. ed. 1112, 1114, 46 Sup. Ct. Rep. 592. To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Frick vs. Pennsylvania, 268 U. S. 473, 494, 69 L. ed. 1058, 1064, 42 A. L. R. 316, 45 Sup. Ct. Rep. 603. And that [fol. 44] is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State."

It clearly appears that the basis of the Court's decision was that the tax there in question was levied upon actual sales—that inasmuch as purchase and sale constitute but one transaction, it was in effect a direct tax upon the purchase by the government and hence a tax upon the United States. It is readily seen that the taxes levied under the Acts here in question are essentially different in character. This distinction is noted by the Circuit Court of Appeals in the Pan-American Petroleum Corporation vs. State of

Alabama, 67 Fed. (2d) 590, and the acts here in question construed not to come within the principles laid down in the Panhandle Case the Court saying:

"It is to be conceded that an excise tax on the sales of gasoline is inoperative as to sales made to the United States, either directly, or indirectly through one of its departments, for government use. Panhandle Oil Co. v. State of Mississippi, 277 U. S. 218, 48 Sup. Ct. 451, 72 L. ed. 857, 56 A. L. R. 583. There a sale of gasoline was made direct to the United States for the use of the coast guard and a government hospital. No doubt the ruling would have been the same if the sales had been made directly to these instrumentalities of the government, for then also the United States would have been the real purchaser. *But the tax here is not on the sale but is on the withdrawal of the gasoline.*"

In construing the character of the tax levied by the laws of Tennessee, providing that "the tax imposed by this act shall apply to persons, firms or corporations, dealers or distributors, storing any of the products mentioned in this Act, and distributing the same, or allowing the same to be withdrawn from storage, whether such withdrawal be for sale or other use," it was said in Nashville C. & St. L. Ry. vs. Wallace, 288 U. S. 249, 53 Sup. Ct. 345:

"Storage of the gasoline and withdrawal of it from storage within the state for use or sale are, as th State Supreme Court has held, the events which, by the very terms of the statute, call it into operation * * *."

"The power to tax property, the sum of all the rights and powers incident to ownerships, necessarily includes the power to tax its constituent elements. * * * Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins."

While this decision involved obviously a question of interstate commerce, and not a United States purchase its is significant of the court's recognition of the character of tax as essentially different from that dealt with in the Panhandle case.

[fol. 45] So far as our tax statutes are concerned, it seems to be quite immaterial what is done with the gasoline after

it is removed from storage. As was said further in the Pan-American Petroleum case (67 Fed. (2) 590):

"That a state has the power to levy an excise tax upon the withdrawal of gasoline from storage *regardless of the use to which it is put,* and even though it be consumed in the generation of motive power for carrying on interstate commerce, is settled by the decision of the Supreme Court in Edelman v. Baling Air Transport, 289 U. S. 249, 53 Sup. Ct. 591, 77 L. ed. 1155."

Again, in American Airways vs. Wallace, 57 Fed. (2d) 877, which was an effort of the interstate carrier of mail, freight and passengers by plane to enjoin the collection of a like tax under the very much similar statutes of Tennessee above referred to on gasoline purchased by the Company admittedly in interstate commerce, stored on its own property and used exclusively in fueling planes engaged in carrying United States mail, freight and passengers in interstate commerce, the court said:

"It is apparent that not every person who uses his property or derives a profit in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. Metcalf v. Mitchell, 269 U. S. 514. 460 Sup. Ct. 172, 70 L. ed. 384.

"'The statute in question does not impose a tax on the Federal Government, nor an instrumentality of the government, nor is it a burden upon or regulation of a governmental function. It is simply a privilege tax upon engaging in a business within the state, and applies to all persons, firms or corporations doing a like business."

The tax in question is somewhat analogous to a state tax based on a percentage of the gross premiums collected by casualty insurance companies from fidelity bonds written as required by federal statute, upon certain officers of the United States and paid for by the United States. Such a tax is valid. Fidelity Deposit Co. v. Pennsylvania, 240 U. S. 319, 60 L. ed. 664, 36 Sup. Ct. 298.

While it is of course, apparent that many of the decisions above cited deal with questions of interstate commerce and not purchases by the Federal Government, they nevertheless afford apt indication of the court's interpretation of

statutes almost identical with ours and its recognition of the essential character of the tax levied by the Acts in question. Moreover, it clearly appears that the decisions chiefly relied upon by the Supreme Court in declaring the particular sales tax dealt with in the Panhandle case invalid as applied to purchases by the United States Government dealt with questions of interstate commerce. It is perhaps worthy of note that the law governing state taxation as affecting interstate commerce has become more liberal since the rendition of the decisions relied on in the Panhandle case.

[fol. 46] It, therefore, appears to me that so far as purchases of gasoline by the United States Government are concerned, these tax acts in question do not impose a burden upon the United States Government, or retard, impede or burden the exercise of its constitutional powers. True it may be that the effect of these taxes may be to increase the price of the commodity which the Federal Government may desire to purchase. This is true in more or less degree with regard to any tax which the state might impose, but that alone does not invoke the constitutional prohibition. The limitations of doctrine of governmental immunity from taxation were well pointed out many years ago in Union Pac. Ry. Co. v. Perriston, 18 Wall. 5, 21 L. ed. 787, wherein it was said:

"It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes must be paid. The states are, and they must ever be coexistence with the National Government."

Yours very truly, A. A. Carmichael, Attorney General.

pdb:b.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed Oct. 12, 1935

Defendants in the above entitled action now file their motion and hereby move to dismiss the above entitled action and to dismiss plaintiff's bill of complaint on file in said action upon each and every of the following grounds, separately and severally:

1. For that there is no equity in the bill.

2. For that under the allegations of Plaintiff's bill, it is not entitled to equitable relief.

3. That the plaintiff's rights are defined and established by the laws and statutes of the State of Alabama, and that the rights so established and defined are conclusive and preclude the Court from granting the relief prayed for in the bill of complaint.

4. That the Court has no jurisdiction of the cause of action attempted to be averred in the said bill.

5. That the plaintiff has a plain, adequate and complete remedy at law.

6. The plaintiff has not made or stated such a case in the bill as entitles it to the relief prayed or to any relief.

7. That the averments of the bill do not show that the excise tax levied by the several statutes of the State of Alabama constitute a tax of six cents (6¢) per gallon on all [fol. 48] gasoline or other liquid motor fuel sold by the plaintiff to the United States in the State of Alabama.

8. It does not appear either from the facts averred in the bill or from the provisions of the several statutes of the State of Alabama, quoted or referred to therein, that the tax levied by such statutes constitutes a tax upon the United States or is such a tax as retards, impedes or burdens the execution by the United States of its constitutional powers.

9. It does not appear either from the facts averred in the bill or from the provisions of the several statutes of the State of Alabama quoted or referred to therein that

such statutes violate any right guaranteed to the plaintiff by the Constitution of the United States.

10. The averments of the bill do not show that the plaintiff is a constitutional agency or instrumentality of the United States and as such exempted in the conduct of its activities from taxation by the State of Alabama.

11. That there is a non-joinder of parties defendant in that the Honorable Bibb Graves, Governor of Alabama, is not made party defendant to said bill.

12. For it affirmatively appears from the averments of the bill that the plaintiff is not an agency of the United States Government or entitled to the exemptions inuring to the United States and its agencies created to carry out its constitutional functions.

13. For that the court judicially knows that the taxes levied by the said several Acts referred to are levied on all storers of gasoline and it is not averred that the United States or any of the agencies of the United States are storers of gasoline or that plaintiff is an agent or instrumentality of the United States entitled to the immunity of the United States.

14. For that it is averred by paragraph 9 of said bill as follows:

"Under the provisions of an act of the Alabama Legis-
[fol. 49] lature approved October 5, 1932 (General Acts of Alabama of 1932, p. 57) each person before engaging in the business of selling, distributing or withdrawing from storage gasoline or other motor fuels in Alabama must procure a license from the State Tax Commission to carry on such business. Section 6 of said act provides that if any such distributor fails to pay all the taxes imposed upon him for engaging in the business of selling, distributing and withdrawing from storage of gasoline, the State Tax Commission may revoke his license upon ten days' written notice to him."

And said averment wholly fails to aver that said license has been revoked or that the State Tax Commission has threatened to revoke said license issued to plaintiff.

15. The allegation of paragraph 10 of said bill that said Acts are violative of the Constitution of the United States

is a mere conclusion of the pleader and contrary to the Court's judicial knowledge.

16. It affirmatively appears from the allegations of said bill, and by the Acts referred to, that the excise tax on gasoline levied by the several Acts described or set out in said bill is an excise tax on the storage of such gasoline in Alabama, said tax to be measured by the withdrawals in Alabama and as such is not a tax on the United States and does not directly retard, impede or burden the United States in the execution of its constitutional functions.

17. The averments of paragraphs (e) and (f) of said bill that the excise tax imposed by said Acts referred to is in violation of the rights guaranteed to plaintiff under the Constitution is a mere argumentive averment of the pleader, it affirmatively appearing from said bill and from the Acts referred to that the excise tax thereby levied, is levied on storers of gasoline, measured by the amount withdrawn from storage, and that there is nothing in the Federal Constitution prohibiting the State from levying such a tax.

18. It affirmatively appears from said bill and from the Acts described and referred to therein that said Acts levy the excise tax on storers of gasoline and that such levy of [fol. 50] such excise taxes is not violative of Section 1 of Article 14 of the Constitution of the United States. The averment that plaintiff will be subject to a penalty of twenty-five per cent (25%) is a mere averment of the pleader contrary to the Court's judicial knowledge and inconsistent with other averments of said bill.

19. The averments of the bill do not sufficiently show that said Acts, as interpreted by the Attorney General and by the Supreme Court of Alabama, are such as to cause plaintiff immediate, continuing and irreparable loss and damage.

20. For that it is not averred that criminal prosecution has been commenced or threatened; it is not averred that plaintiff's license to do business has been revoked or that such revocation has been threatened; it is not shown by the bill as a whole that the plaintiff would be subject to a penalty of twenty-five per cent (25%) of the amount of the tax found to be due, but that to the contrary, said bill, together with the Acts referred to, shows that no twenty-five

per cent (25%) penalty has been levied or is levyable under the allegations of said bill.

21. For that it affirmatively appears from the allegations of said bill that the tax levied by the several Acts is a tax levied on storers of gasoline in Alabama, and it affirmatively appears that plaintiff is a storer of gasoline in the State of Alabama and as such is subject to the excise tax levied by the said several Acts and it does not appear that any tax has been sought or claimed from the United States by the State of Alabama and hence the allegations that the collection of excise taxes under the provisions of said Act upon all gasoline stored in Alabama measured by the amount withdrawn from storage retards, impedes or hinders the United States Government in carrying out its constitutional powers, is a mere averment of the pleader and immaterial to this case, the United States Government not being a party and no tax being sought from the United [fol. 51] States Government.

22. For that the averments of said bill that plaintiff will be subject to a multiplicity of suits is a mere conclusion of the pleader and contrary to the Judicial knowledge of the Court.

A. A. Carmichael, Attorney General; Frontis H. Moore, Assistant Attorney General; Peyton D. Bibb, Assistant Attorney General; Richard T. Rives, Thomas J. Judge, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTING CAUSE, ETC.—Filed Oct. 12, 1935

In this cause, it is ordered that the motion made by the plaintiff in said cause for an interlocutory injunction as prayed in and by the bill of complaint filed in said cause is hereby set down for hearing before the Honorable Joseph C. Hutcheson, Circuit Judge, the Honorable Robert T. Er-

vin, District Judge, and the Honorable C. B. Kennamer, District Judge, at the Court Room of the United States District Court for the Middle District of Alabama, in the City of Montgomery, in the State of Alabama, on Thursday, the 24th day of October, 1935, at 10 o'clock A. M.

C. B. Kennamer, Judge.

At Chambers, October 12, 1935.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 662

NOTICE OF HEARING—Filed Oct. 17, 1935

To the Honorable Bibb Graves, Governor of the State of Alabama:

Notice is hereby given as required by law that the hearing of the motion made by the plaintiff in the above entitled cause for an interlocutory injunction as prayed in and by the bill of complaint filed in said cause has been set down for hearing before the Honorable Joseph C. Hutcheson, Circuit Judge, the Honorable William I. Grubb, District Judge, and the Honorable C. B. Kennamer, District Judge, at the Court Rooms of the United States District Court for the Middle District of Alabama, in the City of Montgomery, in the State of Alabama, on Thursday, the 24th day of October, 1935, at 10 o'clock A. M., and that such hearing will be had at said time and place or as soon thereafter as the said judges may direct. The purpose of said interlocutory injunction as prayed in and by said bill is to restrain the defendants in said cause from the enforcement or execution as against plaintiff in said cause of the following acts of the Legislature of Alabama in so far as said acts levy or impose an excise tax on plaintiff for the privilege of selling or withdrawing from storage for the purpose of selling gasoline or other liquid motor fuels in the State of Alabama to the United States, its departments or agents performing governmental functions in said State, viz:

An Act approved February 10, 1923, entitled

"An Act imposing an excise tax on persons, corporations, co-partnerships, companies, agencies or associations engaged in the business of selling or distributing gasoline or other liquid motor fuels in this state, etc." (General Acts of Alabama of 1923, p. 36), as said act was amended by an act approved August 27, 1927 (General Acts of Ala-
[fol. 54] bama of 1927, p. 326), and as further amended by an act approved July 15, 1931 (General Acts of Alabama of 1931, p. 458);

An Act approved January 25, 1927, entitled

"An Act to impose an excise tax in addition to that already imposed by the act approved February 10, 1923, on persons, corporations, co-partnerships, companies, agencies or associations engaged in the business of selling, distributing, storing or withdrawing from storage for any purpose whatsoever gasoline or other liquid motor fuels or devices or substitutes therefor in this state, etc." (General Acts of 1927, p. 16);

An Act approved July 27, 1931, entitled

"An Act to impose for the use and purpose of supervising, preserving, maintaining, constructing and regulating the use of public roads and bridges in the State of Alabama, and to maintain and supervise state convicts while working upon such roads and bridges, an excise tax on all persons, companies, agencies, corporations and associations who sell, distribute, store or draw from storage for any purpose whatsoever, gasoline or any other liquid motor fuels or devices or any substitutes therefor within the State of Alabama; etc." (General Acts of Alabama of 1931, p. 859);

"An Act approved November 5, 1932, entitled

"An Act to impose an excise tax in addition to any and all other excise taxes now imposed by law on persons, corporations, co-partnerships, companies, agencies or associations engaged in the business of selling, distributing, refining, storing or withdrawing from storage for any purpose whatsoever gasoline or other liquid motor fuels or devices or substitutes therefor in this State; etc." (General Acts of Alabama of 1932, p. 314);

"An Act approved January 31, 1935, entitled

"An Act to impose an excise tax in addition to any and all other excise taxes now imposed by law on persons, corporations, co-partnerships, companies, agencies or associations engaged in selling, distributing, refining, storing or withdrawing from storage for any purpose whatsoever gasoline or other liquid motor fuels or devices or substitutes therefor in this State; and providing for the collection and payment of such tax; and for the examination of the books and records of any persons, corporations, co-partnerships, companies, agencies or associations engaged in selling, distributing, refining, storing or withdrawing from storage for any purpose whatsoever gasoline or other liquid motor fuels or devices or substitutes therefor in this State, etc."

Article XIII, Chapter 4, of the General Revenue Act of 1935 approved July 10, 1935, which imposes an excise tax on persons, corporations, co-partnerships, companies, counties, municipal corporations, school boards or agencies of the State or other agencies or associations engaged in the selling or withdrawing from storage of gasoline and other liquid motor fuels in the State.

The application for said interloeutory injunction by plaintiff is for the reasons and upon the grounds stated in its said bill of complaint.

Witness my hand and seal of this Court at office in the [fol. 55] City of Montgomery, Alabama, on this, the 14th day of October, 1935.

O. D. Street, Jr., Clerk.

To any Marshal of the United States:

You are hereby commanded to forthwith serve the foregoing notice upon the Honorable Bibb Graves, Governor of the State of Alabama, and to make due return of your action in the premises.

Witness my hand and seal of Court at office in the City of Montgomery, Alabama, on this, the 14th day of October, 1935.

O. D. Street, Jr., Clerk.

Executed by delivering copies of the within to Bibb Graves, Governor of the State of Alabama, Albert A. Carmichael, Attorney General for the State of Alabama, Henry

S. Long, President of the State Tax Commission, John P. Kohn, Sr., and W. W. Ramsey, Associate Members of the State Top Commission.

This the 17th day of October, 1935.

Walter Bragg Smith, United States Marshal.

[File endorsement omitted.]

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Oct. 23, 1935

Come the defendants jointly, separately and severally, and do not waive their rights or the rights of either of them to have this cause dismissed as set forth in the motion to dismiss, and reserving those rights the defendants jointly, separately and severally for answer to the bill of complaint state as follows:

1st. For answer to the first paragraph of the bill of complaint the defendants admit the averments of said paragraph.

2nd. For answer to the second paragraph of the bill of complaint the defendants admit the averments of said paragraph, except that the defendants aver and state that they are not the only officials of the State of Alabama charged with the administration, enforcement and execution of the excise tax laws therein referred to, but the defendants aver and state that the constitution and laws of the State of Alabama provide that the Governor shall take care that the laws be faithfully executed; that the President and associate members of the State Tax Commission of Alabama are appointed by the Governor, and are subject to his direction, supervision and control, and that the Honorable Bibb Graves as Governor of the State of Alabama is a necessary and indispensable party to this suit, but is not joined as a defendant herein.

3rd. For answer to the third paragraph of the bill of complaint the defendants say that the averments of the said bill of complaint are so indefinite and uncertain that

the defendants cannot say therefrom what part of the matters and amounts in controversy are properly cognizable [fol. 57] by this Court in this proceeding, and the defendants therefore deny that the amount involved in this suit exclusive of interest and costs exceeds the sum or value of $3,000.00 and demand strict proof thereof.

4th. For answer to the fourth paragraph of the bill of complaint the defendants say that the allegations of said paragraph being conclusions of law and not statements of fact, the defendants neither admit nor deny the same.

5th. For answer to the fifth paragraph of the bill of complaint the defendants admit that the several statutes or acts of the Legislature referred to in said paragraph were duly enacted by the Legislature of the State of Alabama.

6th. For answer to the sixth paragraph of the bill of complaint the defendants admit that since 1927 the plaintiff has been and is now engaged in the business of buying and selling gasoline and other liquid motor fuels commonly used in internal combustion engines in the State of Alabama, and that the plaintiff's predecessor in title was engaged in the like business in said State for many years. The defendants admit that the plaintiff has a large amount of money invested in plant and equipment at its various places of business in the State of Alabama for the conduct of its said business. Whether such amount is over one million dollars or not the defendants are not informed, and, therefore, neither admit nor deny, nor are the defendants informed as to the plaintiff's intentions for the future conduct of its said business. The defendants aver and state that the plaintiff is also engaged in the business of a "storer" of gasoline as defined in the gasoline excise tax acts of the State of Alabama; that as therein defined the term "storer" includes any person who ships or causes to be shipped or receives gasoline into the State of Alabama in any quantity and stores the same in any manner, and withdraws or uses the same for any purpose, and said gasoline excise tax acts further provide that the said excise taxes shall apply to persons storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use, and defendants aver that the plaintiff is a

storer of gasoline and is liable under the acts for the taxes levied thereby, and that plaintiff's purpose in storing such gasoline and withdrawing the same from storage is immaterial as affecting its liability for the taxes levied by the [fol. 58] said several acts.

7th. For answer to the seventh paragraph of the bill of complaint, the defendants admit that the plaintiff has sold and delivered in Alabama large quantities of gasoline to the United States or to its departments or agencies, but the defendants are not informed as to the quantities of gasoline which the plaintiff has sold and delivered in Alabama to the United States or to any particular department or agency, nor whether any particular department or agency to which the plaintiff may have sold gasoline was a proper and constitutional means for the performance of the governmental functions of the United States, or that the use of such gasoline was a necessary means for the performance of such governmental functions. The defendants demand strict proof of each of said matters and things.

The defendants admit that the United States has paid or agreed to pay certain prices for certain of the gasoline sold to it, or to its departments or agencies, but the defendants deny that said prices did not include or take into consideration the taxes imposed by said gasoline excise tax laws, or the liability of the plaintiff therefor, and the defendants further deny the materiality of such allegations, and aver and state that the prices agreed upon between the plaintiff and the United States, or its departments or agencies were mere matters of agreement between them and cannot directly or indirectly affect plaintiff's liability for taxes lawfully imposed.

Defendants deny that all of said gasoline in the amount of 281,254 gallons, sold or delivered to the United States or its agencies within the State of Alabama during the past five years, was withdrawn from storage in Alabama, as defined by the several statutes referred to in the Bill of Complaint, for the purpose at the time of such withdrawal of making delivery to the United States or for the purpose of sale to the United States, but on the contrary the defendants are informed and believe, and upon such information and belief aver that, in keeping with the plaintiff's established method of handling and distributing gaso-

line, all of said gasoline so sold and delivered in Alabama [fol. 59] to the United States or its agencies had been in each instance already stored and withdrawn from storage in Alabama one or more times prior to any such actual sale and delivery to the United States, or before any identifiable part of the mass of plaintiff's gasoline then on hand was ear-marked or set aside for delivery pursuant to a sale actually made, and that the proper excise tax with respect thereto had already accrued and plaintiff's liability therefor had become fixed. Defendants deny the materiality in this regard of the actual use or sale in which the gasoline is involved after its storage and withdrawal. Defendants deny that it is impossible to deliver gasoline in Alabama without storing the same, and withdrawing it from storage in the manner contemplated by the said statutes of Alabama, and deny that the act of withdrawal from storage is a necessary constituent or integral element of every sale thereof, but on the contrary the defendants aver that the act which calls said statutes into operation and fixes the liability of plaintiff to the tax is the storage of gasoline in Alabama, the amount of tax being measured by the amount withdrawn therefrom, and that both the acts of storage and withdrawal are accomplished and completed prior to the designation or devotion of any particular gasoline to any sale or use, and the plaintiff cannot escape or defeat the liability to the tax which has already accrued thereby by claiming that after the storage and withdrawal thereof the gasoline was in fact sold or used in a particular manner. Defendants aver that the plaintiff has not been threatened with criminal prosecution, revocation of license or imposition of any penalty with regard to any of its past transactions, either by the State Tax Commission, or other lawful authority of the State of Alabama.

[fol. 60] The defendants admit that the plaintiff has made monthly reports to the State Tax Commission of Alabama containing information as to its sales and withdrawals from storage of gasoline. The defendants admit that on, to-wit, March 22nd, 1923, Hon. Harwell G. Davis, then Attorney General of Alabama, rendered an opinion upholding the right of the State of Alabama to collect the gasoline excise tax provided by the Act of the Legislature of Alabama approved February 10th, 1923 (General Acts of Alabama of 1923, page 36) measured by the sale of gasoline

to the United States, or an agency or instrumentality thereof, a copy of which said opinion is hereby attached, marked Exhibit "A" and made a part hereof, that thereafter the plaintiff's predecessor in title and other companies like situated paid the said gasoline excise tax without any deduction or exemption on account of gasoline sold to the United States, or its departments, or agencies, and while such practice was continuing, the Legislature of Alabama enacted the statutes referred to in the Bill of Complaint as the Act approved August 27th, 1927 (General Acts of Alabama of 1927, page 326), and the Act approved January 25th, 1927 (General Acts of Alabama of 1927, page 16). Thereafter on, to-wit, May 14th, 1928 the Supreme Court of the United States in the case of Panhandle Oil Company v. State of Mississippi, 277 U. S. 218, 72 L. Ed. 857, held that the statute of the State of Mississippi imposing an "excise tax of one cent per gallon upon the sale of gasoline" was beyond the constitutional powers of the State Legislature insofar as it applied to gasoline sold to the United States. Thereafter the Attorney General of Alabama rendered the opinion dated August 22nd, 1928, a copy of which is attached as Exhibit "F" to the plaintiff's Bill of Complaint. The defendants further admit that the Attorney General of Alabama wrote to the Honorable John H. Sargent, Attorney General of the United States, the letter dated November 22nd, 1928, a copy of which is attached as Exhibit "G" to the plaintiff's Bill of Complaint. The defendants further admit that in the collection of said gasoline excise taxes the officials of the State of Alabama conformed to the said opinions of the State Attorney General until after the Court of Appeals of the United States for the Fifth Circuit had on, to-wit, November 15th, 1933, in the case of Pan American Petroleum Corporation v. State of Alabama, 67 Fed. (2nd) [fol. 61] 590, construed the Act of the Alabama Legislature approved August 27th, 1927 (General Acts of Alabama of 1927, page 326) as follows:

"Appellant contends that the tax accrues only upon the use within the State of gasoline. In our opinion it is payable upon the withdrawal of gasoline from storage within the State, because by the very language of the statute the

tax imposed applies to dealers, distributors and storers, the moment they withdraw it from storage, whether the withdrawal be for sale or other use. It hardly can be assumed in view of this language that the Legislature intended to forego the tax if only the purchaser of gasoline intended to use it in another State, and at the same time insist upon the tax if the purchaser intended to use the gasoline within the State. That a state has the power to levy an excise tax upon the withdrawal of gasoline from storage regardless of the use to which it is put, and even though it be consumed in the generation of motive power for carrying on interstate commerce, is settled by the decision of the Supreme Court in Edelman v. Boeing Air Transport, 289 U. S. 249, 53 S. Ct. 591, 77 L. Ed. 1155. * * * It is to be conceded that an excise tax on the sales of gasoline is inoperative as to sales made to the United States, either directly or indirectly through one of its departments, for government use. Panhandle Oil Co. v. State of Mississippi, 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583. There a sale of gasoline was made direct to the United States for the use of the coast guard and a government hospital. No doubt the ruling would have been the same if the sales had been made directly to these instrumentalities of the government, for then also the United States would have been the real purchaser. But the tax here is not on the sale but is on the withdrawal of the gasoline."

And even thereafter the officials of the State of Alabama continued to conform to the said opinions of the State Attorney General until after the Supreme Court of the State of Alabama, the highest judicial tribunal of said State, in an opinion on which the last rehearing was denied on January 18th, 1934, in the case of State of Alabama v. City of Montgomery, 228 Ala. 93, 151 So. 856, had construed the several gasoline excise tax acts then in force and effect in the State of Alabama, as follows:

"The act first mentioned, Gen. Acts. 1923, p. 36 levies a two cent tax on every distributor and retail dealer in gasoline for every gallon sold in this State. It defines a 'distributor' as including any person who shall engage in the selling of gasoline by wholesale in domestic trade, and a 'retail dealer' as including any person who is a distrib-

utor who also engages in the sale of gasoline in broken quantities.

Its provisions therefore do not show that the city is liable for a tax there described.

The act next mentioned, Gen. Acts 1927, p. 326, amends the first so that the tax is also levied upon a storer of gasoline, in addition to a distributor and retail dealer, and defines a 'storer' as including any person who ships gasoline into this state in tank quantities and stores and withdraws the same for any purpose.

The Act of January 25, 1927 (Gen. Acts 1927, p. 16) is essentially the same as the last above mentioned in levying the tax. Such is also the Act of July 27, 1931 (pages 859, 860), and of November 5, 1932, Ex. Sess. (page 314).

* * *

There is a clear distinction between (1) an excise tax [fol. 62] upon the business, occupation, or privilege of owning, storing and withdrawing gasoline, imposed not only for revenue but also because it is a dangerous explosive, and within the police power of the state, and (2) a tax upon the separate acts of the owner in taking his property out of storage for his own use; for this is a property tax. This distinction is clearly defined in Dawson v. Kentucky Dist. Co., 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638.

It is also shown that the latter is a property tax, though called an excise, and must be controlled by the Constitution insofar as it affects that character of tax rather than an excise. Its designation as an excise or license tax is not conclusive. The cases generally give effect to such distinction and look into its true nature to determine whether there is a prohibition in the Constitution. Sheip & Co. v. Amos, 100 Fla. 863, 130 So. 699, Foster, etc. Co. v. Graham, 154 Tenn. 412, 285 S. W. 570, 47 A. L. R. 971; Bowman v. Continental Oil Co. 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139; Hart Refineries v. Harman, 278 U. S. 499, 49 S. Ct. 188, 73 L. Ed. 475; the Texas Co. v. Brown, 258 U. S. 466, 42 S. Ct. 375, 66 L. Ed. 721.

It is, of course, conceded by all that if it is a tax on the property or an essential element of its ownership, and not on an occupation or for a privilege, it is in violation of Section 91 of the Constitution (of Alabama). The right of the State to tax a City as any other corporation except

as prohibited or limited by the Constitution is not questioned. Van Brocklin, v. Anderson, 117 U. S. 151, 6 S. Ct. 670, 29 L. Ed. 845.

The acts in question impose a tax upon a storer as well as a distributor or retail dealer. We think this is true though it is not due until it is withdrawn from storage, and is measured by the amount so withdrawn rather than the amount placed in storage. True, it may leak and waste out of storage or explode, and thereby and to that extent no tax is payable; but the whole of the acts taken together show, we think, that the purpose is to impose the tax on the storage, though measured by the amount withdrawn, and then it becomes due to be paid.

Since the privilege of storing is the basis of the tax, and for that purpose an excise may be levied, it is immaterial to what use it is put after it is withdrawn from storage. Crockett v. Salt Lake County, 72 Utah 377, 270 P. 142, 60 A. L. R. 867."

The defendants admit that thereafter on, to-wit, June 17th, 1935, Thomas E. Skinner, Special Agent of the State Tax Commission of Alabama, sent to the plaintiff the telegram copied in the seventh paragraph of the plaintiff's Bill of Complaint. Defendants aver that the said Thomas E. Skinner was not authorized to demand of the plaintiff the penalty mentioned in such telegram, nor was he authorized to demand payment by check payable to his order individually. Defendants further admit that on July 5th, 1935, the Attorney General of Alabama rendered an opinion to the State Tax Commission, a copy of which is attached as Exhibit "H" to the plaintiff's Bill of Complaint. After the said construction of said gasoline excise tax acts by the Court of Appeals of the United States for the Fifth Circuit, and by the Supreme Court of the State of Alabama, and even after the last mentioned opinion of the Attorney General of Alabama, the several gasoline excise tax acts then in force and effect and referred to in the plaintiff's Bill of Complaint were superseded by the Revenue Act approved July 10th, 1935, the pertinent parts of [fol. 63] which are attached as Exhibit "E" to the plaintiff's Bill of Complaint.

The defendants admit that the State Tax Commission wrote to the plaintiff the letter dated August 30th, 1935

which is copied in the seventh paragraph of the plaintiff's bill of complaint, and the defendants aver that as stated in said letter, the plaintiff had already been furnished with a copy of the said opinion of the State Attorney General of date July 5, 1935, and that it was the purpose of said letter to request the plaintiff to conform to the holdings of said opinion, that when construed in connection with the Attorney General's opinion to which it refers, said letter does not make demand for any taxes on account of sales made to the United States, and that to remove any possible misapprehension of the meaning and intent of said letter, the State Tax Commission of Alabama on, to-wit, the 10th day of October, 1935 forwarded to the plaintiff and other oil companies similarly situated an explanatory letter as follows:

"10 October, 1935.

The Texas Company, Atlanta, Georgia.

GENTLEMEN:

"Under date of August 30, 1935, I wrote you as follows: 'Under an opinion issued by the Attorney General's Department, dated July 5, the State Tax Commission can not permit deductions from gasoline sales by reason of gallonage sold to the United States Government or Federal Agencies. Under this opinion the tax applies to all sales and withdrawals made in this State.

You will, therefore, please add to your August sales such deductions as you may have made when preparing your returns, covering July sales and remit the tax to this Department along with tax for your August sales, on or before September 20. As you will recall, the Gasoline Department of this Commission advised you under date of July 9, of the above mentioned opinion stating, 'This is for your information and guidance.'

Please bear this in mind when preparing your returns in the future as no allowance can be made by reason of sales to the Federal Government.

The above refers only to those companies which have been making sales to Federal Agencies and deducting such sales from the total number of gallons on which the tax is computed.'

It has come to my knowledge that certain inferences or conclusions had been drawn from the language of this let-

ter not intended thereby to be conveyed. The letter referred to the opinion of the Attorney General of date of July 5, 1935, and was intended to be read along therewith, and it was not intended by said letter to make any claim or demand for taxes other than authorized or held payable by said opinion. The purpose of the letter quoted above was formally to advise you that in keeping with the opinion above referred to and the opinion of the Supreme Court [fol. 64] of Alabama in the case of State of Alabama v. City of Montgomery, 151 Sou. 856, that you as a refiner or storer of gasoline in the State of Alabama as defined in the various gasoline acts are required to compute and pay the excise tax levied thereby on the amount of gasoline stored in the State of Alabama, measured by the amount withdrawn from storage.

As you know, the tax does not apply to shipments in interstate commerce. Nor is the Commission concerned with the use to which the gasoline is put after its withdrawal from storage.

Yours very truly, State Tax Commission, by Henry S. Long, President."

8th. For answer to the eighth paragraph of the Bill of Complaint the defendants admit that since May 14th, 1928 the plaintiff has sold large quantities of gasoline to the United States or its departments or agencies, but defendants deny that the gasoline sold or delivered to the United States or its departments or agencies within the State of Alabama was withdrawn from storage in Alabama as defined by the several statutes referred to in the Bill of Complaint for the purpose at the time of such withdrawal of making delivery to the United States, or for the purpose of sale to the United States and the defendants are informed and believe, and upon such information and belief aver that the method of handling and distributing said gasoline has heretofore been set forth in the seventh paragraph of this answer, and as averred in said paragraph the defendants deny the materiality of the actual use or sale in which the gasoline is involved after its storage and withdrawal therefrom.

The defendants further aver that if the plaintiff has, since May 14, 1928, the date of the decision of the Supreme Court of the United States in Panhandle Oil Company v.

State of Mississippi, ex rel, R. H. Knox, Attorney General, relied upon said decision as an authority which justified it in not paying to the State of Alabama any of said taxes imposed under said acts on account of withdrawals from storage of gasoline sold to the United States, or in not including the amount of said excise taxes in its calculation of the purchase price of sales made to the United States, that the plaintiff has so acted at its own risk, and such conduct of the plaintiff should not prevent the defendants from collecting taxes lawfully imposed.

The defendants admit that the United States and its departments or agencies are, from time to time, buying gaso- [fol. 65] line from the plaintiff and other oil companies, but the defendants deny that the United States, or any of its departments or agencies, have requested or will request the plaintiff to store gasoline in the State of Alabama, or that any such request would be material to the issues involved in this suit.

The defendants expressly deny that it would be impossible or at all impracticable for the United States to carry on and transact its necessary and important governmental functions in Alabama without having gasoline withdrawn from storage in the State and sold and delivered to it at various places therein. The defendants aver that it is not at all impossible for the United States to receive delivery of such gasoline from tank cars or in other methods in interstate commerce, and without said gasoline having been stored in the State of Alabama, or that it would be entirely practicable for the United States itself or through its departments or agencies to store such gasoline as it required to carry on and transact its governmental functions. The defendants are not informed of the plaintiff's intentions as to the future conduct of its business, but the defendants aver that the plaintiff's intention to continue to offer to sell, and to sell gasoline to the United States can have no effect in preventing the defendants from collecting taxes lawfully imposed. The defendants deny that in all future situations the plaintiff will be unable to deliver gasoline to the United States without first withdrawing it from storage, and the defendants aver that withdrawal from storage in the State of Alabama is not a necessary preliminary to the delivery of gasoline to the United States in said State.

The defendants deny that the United States through its departments and agencies is making or will continue to make requests that plaintiff and other persons engaged in the business of selling or distributing gasoline in Alabama make bids or offers to sell to it gasoline to be withdrawn from storage in Alabama, and the defendants aver that it is not material to the United States or to its departments or agencies whether the gasoline delivered to it in Alabama has been stored in said State or not.

The defendants admit that they will continue to make [fol. 66] claims and demands for excise taxes on the storage of gasoline in the State of Alabama lawfully imposed by the Alabama statutes, and measured by the amounts of gasoline withdrawn from storage, whether such withdrawals be for sale or for any other use or purpose, but the defendants deny that they have demanded or intend to demand any penalties of the plaintiff or of other oil companies similarly situated.

The defendants deny that as to any future transactions by the plaintiff with the United States under which the first withdrawal of gasoline from storage in the State of Alabama will be for the purpose of selling and delivering such gasoline to the United States the amount of the claim for such excise taxes will exceed $3,000.00.

The defendants deny that the burden of the excise taxes on the storage of gasoline or on gasoline withdrawn from storage will inevitably be passed on to the buyer of said gasoline, and defendants aver that "whether the burden of any tax paid by the seller is actually passed on to the buyer depends upon considerations so various and complex as to preclude the assumption a priori that any particular tax at any particular time is passed on. In some conditions of the market the burden remains with the seller, or even may be shifted back from the seller to the producer (or refiner) by the reduction of the producer's (or refiner's) price, rather than forward to the consumer by an increase of the seller's price."

The defendants aver, however, that if it be assumed that the plaintiff is correct in stating that both the plaintiff and all other parties withdrawing from storage gasoline for the [fol. 67] purpose of selling same to the United States will add to their price for such commodity the excise tax imposed by said gasoline excise tax act if such tax is legally

due on such transaction, that then the plaintiff is placed at no disadvantage in competing with other sellers of gasoline in the State of Alabama, and the only party who would be injured by the future operation of said gasoline excise tax acts would be the United States and not this plaintiff, and the United States does not complain in this suit.

The defendants deny that the necessary and inevitable operation of the gasoline excise tax acts of the State of Alabama will place any direct tax burden on the United States, or will directly retard, impede or burden the execution by the United States of its constitutional powers to carry on its governmental functions in the State of Alabama.

9th. For answer to the ninth paragraph of said Bill of Complaint the defendants admit that Section 11 of the Act approved February 10th, 1923 as amended by an Act approved August 27th, 1927 is correctly copied in the ninth paragraph of the plaintiff's Bill of Complaint, but the defendants aver that said section and any other similar provisions contained in other Acts imposing gasoline excise taxes in the State of Alabama have been superseded by Schedules 156.14 and 156.15 of Section 348 of the 1935 Revenue Act approved July 10th, 1935, which said schedules are set forth as a part of Exhibit "E" attached to the plaintiff's Bill of Complaint and to which reference is hereby made.

The defendants admit that Sections 6 and 7 of the Act of the Alabama Legislature approved October 5th, 1932, General Acts of Alabama of 1932, page 57, are correctly copied in the ninth paragraph of the plaintiff's Bill of Complaint, but defendants deny that they have threatened the plaintiff with any penalties or criminal prosecution, or the imposition of any such penalties or that the institution of any such criminal prosecution is in any way imminent.

10th. For answer to the tenth paragraph of the Bill of Complaint, the defendants deny that the said gasoline excise tax acts are unconstitutional, void, discriminatory or offensive or repugnant to the Constitution of the United States of America, in any respect or for any reason.

[fol. 68] 11th. For answer to the eleventh paragraph of said Bill of Complaint, the defendants deny that the plaintiff has no adequate remedy at law for the redress of the

wrongs or grievances complained of in its Bill of Complaint.

The defendants specifically deny:

(a) That the plaintiff has been subjected or threatened with subjection to any penalties, or that the imposition of any such penalties is imminent.

(b) That the plaintiff has been called on or will be called on for any taxes on account of sales of gasoline or other liquid motor fuels by it in Alabama to the United States.

(c) That the plaintiff has been subjected or threatened with subjection to any criminal prosecution and fines or penalties imposed by said Acts, or that any such criminal prosecution, fines or penalties are imminent.

(d) That the plaintiff has been subjected or threatened with subjection to the revocation by the State Tax Commission of its license to sell, distribute or withdraw from storage gasoline or other petroleum products in the State of Alabama, or that any such revocation is imminent.

(e) That the defendants have demanded of the plaintiff the payment of any illegal taxes or that the plaintiff has no adequate remedy at law to test the legality of such taxes.

(f) That the taxes demanded by the defendants from the plaintiff are in any way illegal taxes.

(g) That the plaintiff will have to institute a multiplicity of suits against the State of Alabama for the recovery of any illegal taxes claimed or demanded by the defendants.

(h) That the plaintiff will have to institute a multiplicity of suits against each of the sixty-seven counties in the State of Alabama for the recovery of any illegal taxes collected by the State Tax Commission and distributed to such Counties.

(i) That the right of the plaintiff to recover any illegal taxes paid by the plaintiff to the State Tax Commission is doubtful.

Wherefore, the defendants deny that the plaintiff is en- [fol. 69] titled to an interlocutory injunction, or to any permanent injunction as prayed in the plaintiff's Bill of Com-

plaint, or to any other or further relief, and the defendants pray that they may be hence dismissed with their reasonable costs and charges.

Albert A. Carmichael, Attorney General of the State of Alabama; Frontis H. Moore, Asst. Attorney General of the State of Alabama; Peyton Bibb, Spec. Asst. Atty. General of the State of Alabama; Thomas J. Judge, Farley Bldg., Birmingham, Ala.; Richard T. Rives, Montgomery, Alabama, Solicitors for defendants.

[File endorsement omitted.]

[fol. 70] EXHIBIT "A" TO ANSWER

March 22, 1923.

Hon. Joseph John, Assistant United States Attorney, Mobile, Ala.

DEAR SIR:

Replying to your inquiry of the 20th inst., I beg to advise that the Act approved February 10, 1923, requires an excise tax *to be paid by persons selling gasoline in this State.* (Acts of Alabama, First Session 1923, p. 36.) The amount of this tax is measured by the number of gallons sold.

The tax is for the privilege of engaging in that particular business and is not a sales tax collected from and required to be paid by the purchaser of gasoline nor is it a tax imposed on the article itself. In principle, there is no difference between the license tax heretofore required to be paid in this State by operators of filling stations, and the present tax which is measured by the number of gallons sold, both being an excise tax required for the privilege or right to conduct that character of business.

It follows that this is not a tax required to be paid by any agency of the national government and that the party from whom the government agency purchased would not be entitled to a reduction in the amount of privilege tax paid in proportion to the amount sold to such agencies of the national government. In other words, the amount of license tax is measured by the amount of gasoline sold regardless of the person to whom such sale is made.

Whether or not the seller of gasoline includes the amount of this privilege tax in the sale price of the gasoline for the purpose of caring for this particular expense, and whether or not the agencies of the national government are willing to pay a price for gasoline which is sufficient to cover this expense, are matters over which the State has no control.

Yours very truly, Harwell G. Davis, Attorney General.

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO BILL OF COMPLAINT—Filed Oct. 24, 1935

Now comes the plaintiff in the above styled cause, and by leave of Court first had and obtained amends its Bill of Complaint by making as a party thereto Bibb Graves, as Governor of the State of Alabama.

Plaintiff further amends its Complaint by inserting in the second paragraph thereof, just prior to the last sentence contained in said paragraph, the following:

The defendant, Bibb Graves, is Governor of the State of Alabama and as such is required by the Constitution and laws of said State to see that the laws of the State are faithfully executed, and the said members of the said Tax Commission made parties defendant hereto were appointed by said Bibb Graves as said Governor to their respective positions and are subject to his direction, supervision and control.

John S. Coleman, Attorney for Plaintiff, The Texas Company. Bradley, Baldwin, All & White, of Counsel.

We, the undersigned, attorneys of record for the defendants in said cause hereby accept a copy of the foregoing amendment to the Bill of Complaint and waive any further or other service of said amendment to said Bibb Graves, as Governor of the State of Alabama; and also waive any further notice to him of the date set for the hearing of plaintiff's application for the interlocutory injunction as

[fol. 72] prayed in said Bill, which is set for hearing at Montgomery on October 24th, 1935.

A. A. Carmichael, Atty. General; Frontis H. Moore, Asst. Atty. General; Peyton D. Bibb, Asst. Atty. General; R. T. Rives, Thomas J. Judge, Attorneys of Record for Defendants in Above Styled Cause.

[File endorsement omitted.]

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPEARANCE AND JOINDER OF HON. BIBB GRAVES, AS GOVERNOR—Filed Nov. 2, 1935

Comes the defendant Bibb Graves, as Governor of the State of Alabama and adopts and joins in the motion to dismiss the bill of complaint and the answer filed on behalf of the other defendants to this cause.

A. A. Carmichael, Attorney General; Frontis H. Moore, Asst. Attorney General, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO SUBMISSION, ETC.—Filed Nov. 2, 1935

This cause having been submitted on the plaintiff's application for an interlocutory injunction as prayed in its bill of complaint and other pleadings filed in said cause upon an agreed statement of facts and certain additional evidence introduced by each of the parties, it is now agreed by and between the plaintiff and the defendants, by and through their respective attorneys of record, that this cause may also be submitted for final decree upon the pleadings and upon the same agreed statement of facts and addi-

tional evidence introduced upon the hearing of plaintiff's application for an interlocutory injunction. This agreement shall not be construed as in any way constituting a waiver by plaintiff of its insistence on its application for the interlocutory injunction as prayed in its bill of complaint.

John S. Coleman, Attorneys of Record for Plaintiff, The Texas Company. Bradley, Baldwin, All & White, of Counsel. A. A. Carmichael, Attorney General; Frontis H. Moore, Assistant Attorney General; Peyton D. Bibb, Assistant Attorney General; Thomas J. Judge, Richard T. Rives, Attorneys for Defendants.

[fol. 75] [File endorsement omitted.]

[fol. 76] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO STATEMENT OF EVIDENCE—Filed Jan. 3, 1936

Before the Honorables J. C. Hutcheson, Circuit Judge, and Robert T. Ervin and Charles B. Kennamer, District Judges, Composing the Court Consisting of Three Judges Under Section 380 of Title 28 of the United States Code Annotated (Judicial Code, Section 266 Amended).

It is hereby stipulated and agreed by and between counsel for plaintiff and defendants in the above styled cause that a full, true and correct statement of the evidence in said cause under Equity Rule 75 consists of the findings of fact made by the Court in this cause, including the written agreed statement of facts and all Exhibits therein referred to and made a part of said findings of fact, and in addition thereto the facts stated in said findings of fact, and further the following written affidavits introduced in evidence by the plaintiff: Affidavits of F. L. Tosch, A. G. Reynolds, S. A. Herbert, D. L. Gilland, L. H. Rogge and Howell Turner, and also the following written affidavits introduced

in evidence by the defendants: Affidavits of A. B. Tucker and Mark L. Tucker.

Albert A. Carmichael, Attorney General of the State of Alabama; Frontis H. Moore, Asst. Atty. General of the State of Alabama; Peyton Bibb, Spec. Asst. Atty. General of the State of Ala.; Thomas J. Judge, Farley Bldg., Birmingham, Ala.; Richard [fol. 77] T. Rives, Montgomery, Alabama; Attorneys for Defendants. John S. Coleman, Birmingham, Ala.; Bradley, Baldwin, All & White, Birmingham, Ala., Attorneys for Plaintiff.

The foregoing stipulation and the statement of evidence as therein stipulated is approved as a true, complete and properly prepared statement of evidence at the trial of this cause, and may be filed in the Clerk's office and become a part of the record.

This the 3rd day of January, 1936.

J. C. Hutcheson, Circuit Judge. Robert T. Erwin, District Judge. Charles B. Kennamer, District Judge.

[File endorsement omitted.]

[fol. 78] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Statement of Evidence

AFFIDAVIT OF F. L. TOSCH—Filed Oct. 24, 1935

STATE OF ALABAMA,
County of ——:

Personally appeared before me, the undersigned authority in and for said County in said State, F. L. Tosch, who, being by me first duly sworn, deposes and says:

I am and have been for the past five years Chief Accountant for the Texas Company at its district office in Atlanta, Georgia, and reside in said City. This is the district office of the Company for several states, including Alabama, Georgia and South Carolina, and the records of said

Company covering its transactions in Alabama are kept there. It is a part of my duties to make reports to the State Tax Commission each month covering sales, distributions and withdrawals from storage of gasoline by my Company in the State of Alabama during the preceding month. These reports are compiled from information forwarded to and kept in my office, and I personally examine and certify to the correctness of such reports.

I have read the agreed statement of facts filed in this cause as evidence on this hearing, including those parts of said statement as to the method my Company has employed in handling through its independent service stations located in Alabama gasoline sold and delivered to the United States or its departments or agencies. In preparing and filing the monthly tax returns or reports to the State Tax Commission above mentioned I have included in the amount of gasoline shown in such reports as having been sold to the United States or its departments or agencies and therefore not to be included in computing the amount of said excise taxes due by the company to the State the quantity of gasoline which was reported by said independent dealers as having been sold and delivered by said independent dealers to the United States or its departments or agencies and identified or evidenced by Federal Tax Exemption Certificates (Standard Form #44) and as further identified by receipts given to said independent dealers by the employees or representatives of the United States or its departments or agencies at the time of each said delivery and sale, which said tax exemption certificates and receipts were delivered by the independent dealers to the Company, and the state excise taxes have not been paid by the company with respect to the gasoline so included and shown in such reports. [fol. 79] Taxes were collected from the independent dealers for the account of all Company gasoline sold and delivered by them for which they did not have said tax exemption certificates, and the amounts so collected were remitted by the Company to the State Tax Commission.

I am familiar with the transactions in Alabama between the Company and the United States, its departments or agencies, since I have been said Chief Accountant, and in none of the said transactions did the Texas Company charge or include in the price received by the Company for the gasoline sold and delivered by it in the State of Alabama to the United States or its departments or agencies any

excise taxes imposed by the State and based on the selling, distribution or withdrawal from storage of gasoline, and the Company has not paid any excise tax to the State of Alabama on account of such transactions. If The Texas Company is required to pay the gasoline taxes imposed by the Gasoline Excise Tax Acts of Alabama on account of sales to the United States or its departments or agencies or on account of gasoline which is withdrawn from storage in Alabama and delivered to the United States or its departments or agencies in the future said Company will add to the price at which it will sell or attempt to sell said gasoline to said parties the amount of such excise taxes in effect on the State of Alabama at the time of such sales or attempts to sell such commodity.

I am informed and believe and upon such information and belief state that the profit which The Texas Company has made on the gasoline sold and delivered in Alabama by it to the United States, its departments or agencies, will not average as much as one cent per gallon.

During the past five years, in addition to the taxes imposed by the State Excise Tax Acts on the sale, distribution or withdrawal from storage of gasoline in Alabama, the Legislature of Alabama has adopted local statutes which authorize certain counties in the State to levy and collect taxes from one cent to three cents per gallon on the sale, distribution or withdrawal from storage of gasoline and other liquid motor fuels within their respective boundaries, and five or more of the counties in the State have imposed or are now imposing such taxes. More than one hundred and sixty incorporated cities and towns in the State have adopted ordinances levying and imposing taxes on the sale, distribution or withdrawal from storage of gasoline within [fol. 80] their respective boundaries, which taxes are in addition to those levied and imposed by the State and by said counties, and amount to from one cent to two cents per gallon. None of said counties and none of said cities and towns have, to the best of my information and knowledge, collected or attempted to collect any of the said excise taxes imposed by them or any of them based on the sale, distribution or withdrawal from storage of gasoline sold and delivered by The Texas Company or by any other Company to the United States or its departments or agencies within their respective boundaries.

On the gasoline which was handled through the independent dealer service stations in the manner set out in the agreed statement of facts, the amount of said excise taxes provided by the Alabama Excise Tax Acts was not included in the price at which said gasoline was sold and delivered to the United States of its said departments or agencies.

I am familiar with the provisions of the contract referred to in Paragraph XIV of the agreed statement of facts, and designated as Exhibit 23. The Company has made an effort to get this contract, or a copy thereof, from the United States Government officials at Washington, and I understand that it is now being forwarded. This contract provides that my Company shall make tank car deliveries f.o.b. Mobile, Alabama, consigned to the Quarter Master United States Army, Fort McClellan, Alabama, and also to make said tank car deliveries f.o.b. Mobile, Alabama, consigned to the Quarter Master United States Army, Maxwell Field, Alabama, and also make deliveries f. o. b. Mobile, Alabama, of gasoline consigned to the Tennessee Valley Authority Wilson Dam, Alabama. Under the terms of these contracts, the Company is obligated to furnish the requirements that each of these agencies or departments of the United States may need or require from October 1, 1935, through December 30, 1935. This contract became effective October 1, 1935, and the Company has already shipped four or five tank cars of gasoline thereunder from Mobile, Alabama, and intends to continue to make deliveries under said contract. The tank cars contain approximately 8,000 gallons of gasoline each.

F. L. Tosch.

Subscribed and sworn to before me this October 24, 1935. Edna M. Jones, Notary Public, Montgomery County, Alabama.

[fol. 81] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF A. G. REYNOLDS—Filed Oct. 24, 1935

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned Notary Public, in and for said State and County, this day personally appeared A. G.

Reynolds, who being by me first duly sworn, deposes and says that he is employed by the Pan American Petroleum Corporation, as its office Manager and Assistant Secretary; that he is familiar with the reports made by the Pan-American Petroleum Corporation, to the Alabama State Tax Commission since January 1, 1930; that Pan American Petroleum Corporation has, since a date prior to January 1, 1930, shown in its reports to the Alabama State Tax Commission, under separate headings, gasoline which was sold in the State of Alabama and gasoline which was withdrawn in the State of Alabama for uses other than for sale, and the Alabama State Tax Commission has not demanded and the Company has not paid, on the basis of withdrawals, any excise tax where the gasoline has been reported as sold, but has only paid a tax on withdrawals of the gasoline in those instances where the gasoline was withdrawn for some uses other than sale. No reports have been made by the Company on gasoline sold or intended for sale until after the title to such gasoline passed from the Company to the purchaser thereof, and no report has ever been made on gasoline withdrawn for uses other than sale until the time such gasoline was actually withdrawn for such other uses.

The Pan American Petroleum Corporation has been advised, from time to time, by the opinions of the Attorney General of the State of Alabama and by the letters and other statements of the Alabama State Tax Commission that the Alabama Excise Tax was not payable on sales made direct by the Pan American Petroleum Corporation, to the United States Government or to the departments or agencies of the United States Government and the Pan American Petroleum Corporation has relied on said opinions, letters and statements and from time to time since the first day of January, 1930 sold to the United States Government, its agencies, or departments, gasoline at a price which did not include the Alabama State excise tax. [fol. 82] Affiant further avers that practically all sales of gasoline made to the United States Government, its agencies or departments, are made under contracts covering the sale of gasoline in a large number of states and said contracts provide that the price of gasoline stipulated therein is the price of said gasoline including all state taxes; that all sales of gasoline made by the Pan American Petroleum Corporation to the United States Government from Jan-

uary 1, 1930 to July 5, 1935 were made at prices which did not include the Alabama Gasoline excise tax; that since the Pan American Petroleum Corporation has been apprised of the opinion of the Attorney General of the State of Alabama dated July 5, 1935, the Pan American Petroleum Corporation has been unable to make any sales of gasoline in the State of Alabama to the United States Government, its agencies or departments at a price which included the State gasoline excise tax and since said date Pan American Petroleum Corporation has made no sales to the United States Government, its agencies or departments in the State of Alabama save such sales as were called for by contracts executed prior to July 5th, 1935.

A. G. Reynolds. O. K. J. S. C.

Sworn to and subscribed before me this the 23rd day of October, 1935. Lloyd J. Cobb, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 83] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF S. A. HERBERT—Filed Oct. 24, 1935

STATE OF MISSOURI,
City of St. Louis, ss:

Before me, the undersigned Notary Public in and for said State and City, this day personally appeared S. A. Herbert, who, being by me first duly sworn, deposes and says that he is employed by the Shell Petroleum Corporation as its Tax Supervisor; that he is familiar with the reports made by the Shell Petroleum Corporation to the Alabama State Tax Commission since January 1, 1930, that the Shell Petroleum Corporation has, since a date prior to January 1, 1930, shown in its reports to the Alabama State Tax Commission, under separate headings, gasoline which was sold in the State of Alabama and gasoline which was withdrawn in the State of Alabama for uses other than for sale, and the Alabama State Tax Commission has not demanded and the Company has not paid, on the basis of withdrawals, any excise tax where the gasoline has been reported as sold, but has only paid a tax on withdrawals of the gasoline in those instances where the gasoline was

withdrawn for some uses other than sale. No reports have been made by the Company on gasoline sold or intended for sale until after the title to such gasoline passed from the Company to the purchaser thereof, and no report has ever been made on gasoline withdrawn for uses other than sale until the time such gasoline was actually withdrawn for such other uses.

The Shell Petroleum Corporation has been advised, from time to time, by the opinions of the Attorney General of the State of Alabama and by the letters and other statements of the Alabama State Tax Commission that the Alabama excise tax was not payable on sales made direct by [fol. 84] the Shell Petroleum Corporation to the United States Government or to the departments or agencies of the United States Government, and the Shell Petroleum Corporation has relied on said opinions, letters and statements, and from time to time since the first day of January, 1930, sold to the United States Government, its agencies or departments, gasoline at a price which did not include the Alabama State excise tax.

Affiant further avers that practically all sales of gasoline made to the United States Government, its agencies or departments, are made under contracts covering the sale of gasoline in a large number of states and said contracts provide that the price of gasoline stipulated therein is the price of said gasoline excluding all state taxes; that all sales of gasoline made by the Shell Petroleum Corporation to the United States Government from January 1, 1930, to July 5, 1935, were made at prices which did not include the Alabama Gasoline excise tax; that since the Shell Petroleum Corporation has been apprised of the opinion of the Attorney General of the State of Alabama dated July 5, 1935, the Shell Petroleum Corporation has been unable to make any sales of gasoline in the State of Alabama to the United States Government, its agencies or departments at a price which included the State gasoline excise tax.

(Signed) S. A. Herbert, Tax Supervisor.

Sworn to and subscribed before me this 21st day of October, 1935. (Signed) R. R. McGregor, Notary Public. My Commission expires August 9, 1939. (Seal.)

[File endorsement omitted.]

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF D. L. GILLAND, STATE MANAGER THE PURE OIL COMPANY AND VICE-PRESIDENT OF WOFFORD OIL COMPANY—Filed Oct. 29, 1935

Before me, the undersigned authority in and for said county in said state, personally appeared D. L. Gilland, known to me, who being by me first duly sworn, deposes and says:

That for more than five (5) years next preceding the making of this affidavit he has been connected with the Wofford Oil Company and The Pure Oil Company in the State of Alabama. That he was vice-president in charge of operations of the Wofford Oil Company, and that he is the manager for The Pure Oil Company in the State of Alabama and as such is familiar with the operations of both companies in this state over a period of time for more than five years next preceding the making of this affidavit. That during the summer of 1934 the operations of the Wofford Oil Company in the State of Alabama were taken over by The Pure Oil Company, who owned all of the capital stock of the Wofford Oil Company, and since that time the operations in this state have been carried on as Wofford Oil Division of The Pure Oil Company.

That the business done in this state at the present time and for more than five years next preceding the making of this affidavit has been extensive. The company operates thirty bulk plants, serves between eight hundred and one thousand retail dealers, and its sales per year in the State of Alabama are approximately 20,000,000 gallons of motor fuel and it has a large investment in the State of Alabama. [fol. 86] That prior to the recent ruling of the Attorney General of Alabama that motor fuel withdrawn from storage and sold to the Federal Government or its agencies or instrumentalities was not exempt from the State of Alabama motor fuel tax of six cents per gallon, it had sold to the Federal Government or to its instrumentalities, motor fuel without adding the motor fuel tax to the sales price, relying on prior opinions of the Attorney General of the State of Alabama to the effect that withdrawals from storage of gasoline in this state and sales of same to the Gov-

ernment were not subject to the State gas tax, and that it had secured this business in competition with other oil companies doing business in the State of Alabama, who likewise did not add the State gas tax to the sales price; that the gas tax on sales thus made in the State of Alabama to the Federal Government, according to the contention of the State of Alabama, amounts to approximately $35,000.00, which the State of Alabama now claims the Wofford and Pure Oil Companies are due to the State.

That after receipt of notice from the Attorney General of Alabama that in his opinion withdrawals from storage and sales to the Government of motor fuel was subject to the State gas tax of six cents, it has, in its bids to the Government for its requirement of motor fuel in this state, added the gas tax of six cents, but has secured no further business from the Government; that the State tax on gasoline is largely in excess of the profit on previous sales to the Government; that said tax cannot be absorbed without The Pure and Wofford Oil Company suffering a very substantial loss on the sales, and that it cannot be passed on to the Government as the Government and its instrumentalities refuse to pay the tax; that on sales made to the Government prior to the ruling of the Attorney General to the effect that the gas tax applied to sales to the Government, and which did not include the six cents gas tax imposed by the State of Alabama on the withdrawal and sale of gasoline, its net profits on said sales were not in excess of two (2) cents per gallon.

(Signed) D. L. Gilland.

Sworn to and subscribed before me on this 23rd day of October, 1935. (Signed) Olive Greene, Notary Public.

[File endorsement omitted.]

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF L. H. ROGGE—Filed Nov. 1, 1935

Before me, Alex W. Swords, a Notary Public in and for the State of Louisiana, Parish of Orleans, personally ap-

peared L. H. Rogge, who is known to me, who being by me first duly sworn, deposes and says that he is Tax Representative of the Gulf Refining Company, a corporation organized under the laws of the State of Texas, the district of affiant including the State of Alabama; that he has been employed in the Tax Department of the said Gulf Refining Company for a period of approximately eight years; that he has personal knowledge of the payment of the gasoline excise taxes required by the State of Alabama on gasoline withdrawn from storage in the State of Alabama and sold to various parties and is familiar with the constructions placed upon such statutes by the State Tax Commission of Alabama and by the Attorney General of Alabama; that during the period from January 1st, 1930, up to the present time, the said Gulf Refining Company has paid to the State of Alabama all gasoline taxes due by it on all gasoline withdrawn from storage in the State of Alabama and sold to various parties in the State of Alabama, with the exception of gasoline sold to the United States Government or to Instrumentalities thereof; that prior to June of this year, 1935, neither the State Tax Commission, the Attorney General of Alabama, nor any other official or representative of the State Tax Commission had ever claimed or contended that the Alabama Gasoline Excise Tax was due and payable on gasoline which was withdrawn from storage and sold to the United States Government or to Instrumentalities thereof; that at all times during the period from January 1st, 1930, down to the present time, no tax has been paid on any withdrawals from storage, when such withdrawals were made as an incident to, or a [fol. 88] constituent part of, a sale, and the gasoline excise tax has been demanded upon, and been paid upon, the sale of such gasoline rather than upon the withdrawal thereof from storage when such withdrawal was a part of the action necessary to be taken in order to make a sale; that the profit which the Gulf Refining Company makes on sales of gasoline to the United States Government or to its Instrumentalities is less than one cent per gallon, and in fact under some contracts now in force between the Gulf Refining Company and the United States Government, the Gulf Refining Company is actually taking a small loss on sales of gasoline to the United States Government; that it is utterly impossible for the oil com-

panies to absorb this gasoline excise tax of six cents per gallon and it is absolutely necessary that this gasoline tax be passed on down to the purchaser; that the United States requires all bids from oil companies for the furnishing of gasoline to the United States to be fixed at a price which does not include any state gasoline excise tax; that in the opinion of affiant it would be impossible for any oil company to obtain a contract to furnish gasoline to the United States or to its Instrumentalities in the State of Alabama unless the Oil Companies are relieved from paying the six cents per gallon gasoline excise tax on such withdrawals from storage for sale to the United States or to its Instrumentalities; and that the effect of the Alabama State Tax Commission collecting this six cents per gallon gasoline excise tax on withdrawals from storage for sale to the United States or to its Instrumentalities in the State of Alabama would be that no sales of gasoline can possibly be made to the United States or to its Instrumentalities in the State of Alabama.

(Signed) L. H. Rogge.

Sworn to and subscribed before me by L. H. Rogge, this 30 day of October, 1935, as witness my hand and Official Seal. (Signed) Alex. W. Swords, Notary Public, Parish of Orleans, Louisiana. (Notarial Seal.)

[File endorsement omitted.]

[fol. 89] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HOWELL TURNER—Filed Nov. 2, 1935

STATE OF ALABAMA,
Montgomery County:

Before me, Agnes Baggett, a Notary Public in and for the State of Alabama and County of Montgomery, personally appeared Howell Turner, who is known to me, who being by me first duly sworn deposes and says that he is Secretary of State of the State of Alabama and as such is the custodian of and familiar with the Journals of the House of Representatives and of the Senate of the State

of Alabama; that House Bill No. 324, known as the Revenue Bill, was prepared during the recess of the Legislature of Alabama, which recess covered the period from the 8th day of February, 1935, to the 30th day of April, 1935; that as shown by the said Journals the said House Bill No. 324 was introduced in the House of Representatives of the Legislature of Alabama on the 3rd day of May, 1935; that Schedule 159.1 and Schedule 159.2 of Article XIII of Chapter 4 of the said Revenue Bill as originally introduced in the House of Representatives, which schedules are found on pages 367 and 368 of the printed Revenue Bill as introduced, are as follows:

"Schedule 159.1. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline as herein defined, provided, however, that this excise tax shall not be levied on the sale of gasoline in interstate commerce, and provided further, that where the excise tax of six cents ($0.06) per gallon upon the sale, distribution, storage or withdrawal from storage of such gasoline shall have been paid by a distributor, refiner, or by retail dealer or storer, such payment shall be sufficient, the intention being that the tax shall be paid but once."

"Schedule 159.2. The excise tax imposed by Section — hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided that 'sellers' of gasoline and its substitute paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions;"

that the said Schedule 159.1 and Schedule 159.2 are identical in form with Schedule 156.1 and Schedule 156.2 of the Revenue Bill as finally passed by the House and Senate and approved by the Governor, with the exception that in Schedule 156.2 of the Revenue Bill as finally passed by the House and Senate and approved by the Governor the

blank space shown on the second line of Schedule 159.2 of this Revenue Bill as originally introduced in the House was filled in by inserting the figure "156.1", this blank having evidently been left in the Revenue Bill as originally introduced in order that the correct number of the section of the Revenue Bill as finally passed could be in-
[fol. 90] serted therein after the different sections and schedules of the Revenue Bill received their final numbering; that the said Revenue Bill, with certain amendments not covering the two sections above set out, was passed by the House on the 12th day of June, 1935, and sent to the Senate; that a substitute was offered in the Senate, not changing the two sections above set out, and passed on the 28th day of June, 1935; that House and Senate Conference Committees were appointed on the 28th day of June, 1935; that the Conference Report on the said Revenue Bill was adopted by both the House and the Senate on the 3rd day of July, 1935; that said Revenue Bill, as amended, said amendments not covering the two sections above set out, was finally read a third time at length and passed by the House and Senate on July 3, 1935; that, while some sections of the Revenue Bill as originally drafted were amended, yet no changes whatever were made in the two gasoline tax sections above referred to with the exception of the filling in of the number of the section hereinabove referred to; and that the said Bill as finally passed was approved by the Governor of Alabama on the 10th day of July, 1935.

(Signed) Howell Turner.

Subscribed and sworn to before me by Howell Turner this 31st day of October, 1935. (Signed) Agnes Baggett, Notary Public, Montgomery County, Alabama. (Notarial Seal.)

[File endorsement omitted.]

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF A. B. TUCKER—Filed by the Defendants Oct. 24, 1935

STATE OF ALABAMA,
Montgomery County:

Before me the undersigned authority in and for said State and County personally appeared A. B. Tucker, who, being by me first duly sworn, deposes and says: My name is A. B. Tucker. I am Chief Clerk of the Gasoline Department of the State Tax Commission of the State of Alabama and have occupied such position since April 1, 1931. I am familiar with the returns which the Texas Company and other distributors and storers of gasoline have made to the State Tax Commission under the requirements of the several Gasoline Excise Tax Acts of the Legislature of Alabama for such period. It has been my duty throughout this period to inspect and generally supervise the administration and collection of the tax.

At no time during said period did the Texas Company or any other distributor or storer of gasoline in Alabama make or attempt to make or claim any deduction from the amount of excise taxes shown to be due by such reports on account of any sale, delivery or contract of sale or delivery to the State of Alabama.

[fol. 92] The State Tax Commission has uniformly collected the excise tax with respect to all gasoline stored or withdrawn from storage in Alabama for sales to the State or to counties, municipalities or other political subdivisions of the State without allowing any deduction on account of such sales or without any claim having been made for such deduction.

As Chief Clerk, I have charge of the records of the Gasoline Department of the State Tax Commission for a period of approximately four years preceding the period I became Chief Clerk, and so far as such records disclose or as I can determine from the records or letters on file, no allowance or deduction has ever been given the Texas Company or any other distributors or storers of gasoline in Alabama on account of any gasoline stored and withdrawn

from storage in Alabama for sale or delivery to the State of Alabama or any if its political subdivisions.

A. B. Tucker, Affiant.

Sworn to and subscribed before me this the 24th day of October, 1935. Alice Kent Baldwin, Notary Public, Montgomery County, Alabama.

[File endorsement omitted.]

[fol. 93] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MARK L. TUCKER—Filed by the Defendants Oct. 24, 1935

STATE OF ALABAMA,
Montgomery County:

Personally appeared before me, the undersigned authority in and for said state and county, Mark L. Tucker, who being duly sworn, deposes and says that he was agent of the State Tax Commission for the State of Alabama in charge of the gasoline division during the years 1927 and 1928, and that during the years 1929 and 1930 he was a member of the State Tax Commission of Alabama, and that during the years 1927, 1928 and 1929 and up until the decision of the United States Supreme Court in the case of Panhandle Oil Co. v. Knox, 277 U. S. 218, that all oil and gasoline companies doing business in Alabama paid the excise tax on gasoline without any deduction being made on account of sales of gasoline to the United States or its departments or agencies; that the practice was to pay on withdrawals from storage and that this was the construction of the act by the State Tax Commission and the state authorities during the period hereinabove mentioned.

Mark L. Tucker, Affiant.

Sworn to and subscribed before me this the 24th day of Oct., 1935. Margaret S. Jones, N. P., Montgomery County, Ala.

[fol. 94] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Agreed Statement of Facts—Filed Oct. 24, 1935

It is agreed by and between the plaintiff and the defendants in the above styled cause by and through their respective attorneys of record that the following stipulation of facts shall be and constitute an agreed statment of facts on the hearing of plaintiff's application for an interlocutory injunction in said cause, and that the Court shall consider the same insofar as material as fully and completely as if testified to or introduced as evidence under the ordinary rules of evidence. Either party may introduce additional evidence at said hearing should it desire to do so.

Such stipulation and agreed statement of facts is as follows:

I

The plaintiff, The Texas Company, herein called "Company" is a corporation duly organized and existing under the laws of the State of Delaware and is duly qualified in [fol. 95] accordance with the laws of the State of Alabama to do business in Alabama and has been so qualified and has continuously transacted business in said State since the year 1927. Company's immediate predecessor in title and interest was engaged in said business in the State of Alabama for more than fifteen (15) years immediately preceding the Company and operated under the same corporate name as Company. Company now has and has had continuously since the year 1927, an investment in the State of Alabama in excess of One Million ($1,000,000.00) Dollars in plant property and equipment at its various places of business in said State for the conduct of its business in Alabama. The Company has a substantial investment in property and equipment in each of the sixty-seven (67) counties in the State, but in some counties the investment is larger than in others. The principal business carried on or transacted by the Company in said State is the selling, marketing and delivering of gasoline, kerosene, lubricating oils and other petroleum products. None of

these products are manufactured in the State of Alabama. The largest single commodity dealt in by the Company in said State is gasoline, which is handled in the manner hereinafter stated.

II

The defendant, Albert A. Carmichael, is Attorney General of Alabama and as such is required by the laws of said State to prosecute parties who violate the laws of said State and to institute and maintain on behalf of the State actions, suits and proceedings against those who fail to comply with the laws of the State, imposing or relating to taxes payable to the State. The defendant, Henry S. Long, is President and defendants, John P. Kohn, Sr. and W. W. Ramsey, are associate members of the State Tax Commission of Alabama and as such are required to collect the taxes imposed by the laws of Alabama and payable to said [fol. 96] State and to detect and prosecute or cause to be prosecuted all parties who violate any of said laws or who fail to pay the taxes imposed thereunder. The defendant, Bibb Graves, is Governor of the State of Alabama and as such is required by the Constitution and laws of said State to see that the laws of the State are faithfully executed. The members of the State Tax Commission were appointed by said defendant as Governor and are subject to his direction, supervision and control. All of said defendants have their offices as such State officials in the City of Montgomery, Alabama, and reside in said City.

III

The Acts adopted by the Legislature of Alabama, imposing excise taxes on the sale, distribution, or withdrawal from storage of gasoline and other liquid motor fuels are either correctly set forth in paragraph five (5) of Company's Bill of Complaint, or are referred to in said paragraph and attached as exhibits to said Bill and were or are in effect as stated in said Bill.

IV

Exhibits "F", "G", and "H" to the Bill of Complaint are correct copies of the opinions of the Attorney General's of Alabama and were rendered on the respective dates

shown on such copies. The Attorney General of Alabama also rendered an opinion, dated July 14, 1933, which is hereto attached, marked Exhibit "I" and is made a part hereof, and rendered the opinion dated March 22, 1923, attached to the defendants' answer as Exhibit "A".

V

The telegram dated June 17, 1935 set out in paragraph [fol. 97] seven (7) of the Bill of Complaint as forwarded on said date by Thomas E. Skinner, who was at that time special agent of the State Tax Commission and authorized to send same. Said telegram was received by The Texas Company on the same date that it was forwarded. The letter dated August 30, 1935, set out in paragraph seven (7) of the Bill of Complaint, was forwarded by the State Tax Commission and received by Company as is stated in said paragraph. The letter dated October 10, 1935, set out in paragraph seven (7) of the defendants' answer, was sent by the State Tax Commission and received by Company. The officials representing the State Tax Commission, before the institution of this suit, informed the agents or attorneys of the Company that if the taxes imposed by the Alabama Gasoline Excise Tax Acts were not paid on all gasoline withdrawn from storage in the State of Alabama and sold in said State to the United States, or to its departments or agencies, during a period of the preceding five (5) years, that a suit or suits would be instituted to recover same and that the Company and other oil companies withdrawing from storage in Alabama gasoline and delivering same in said State to the United States, or its departments or agencies, would be required to pay the taxes imposed by said Gasoline Excise Tax Acts on account of such withdrawals, and that if such taxes were not paid the Company and the other oil companies engaged in such transactions would be subjected to the penalties provided in said Acts. Suits were instituted against five (5) of the oil companies selling large quantities of gasoline in the State of Alabama, but no suit was instituted against the Company. These suits were for the recovery of said Excise taxes on account of gasoline withdrawn from storage in Alabama and delivered to the United States, or its departments or agencies, during a period of five (5) years next preceding the date of the institution of the suits. Said suits

[fol. 98] were dismissed by the attorneys representing the State, with the statement that other suits based on the same causes of action would be refiled. The defendants, in their respective official capacities with the State of Alabama, intend to immediately follow the ruling of the Attorney General of Alabama, dated July 3, 1935, and attached to the Bill of Complaint as Exhibit "H" and to collect or attempt to collect from those parties withdrawing from storage in Alabama gasoline and other liquid motor fuels and selling same to the United States, or its said departments or agencies, the taxes held under said opinion to be imposed on said parties on account of said transactions, unless said defendants are enjoined or restrained from doing so by judicial order or decree.

VI

The Company has never manufactured or refined any gasoline within the State of Alabama and since prior to January 1, 1930 all of the gasoline which it has sold or withdrawn from storage in said State was manufactured or refined at its refinery located at Port Arthur, Texas, and then shipped by the Company in its boats or barges to its Terminals located either in the City of Mobile, Alabama, or in the City of Pensacola, Florida, or in the Town of Millville, Florida. These Terminals are located at or near the docks or wharfs located in said cities or town and consist of storage tanks and other facilities for the direct unloading and reception of the gasoline as it comes to the Company's boats or barges from said refinery. After the gasoline was and is received at the Terminals, it was and is shipped either by railroad in tank cars, or in boats to the bulk plants of the Company, or to the customers of the Company located principally in the States of Alabama, Florida, Georgia, Louisiana, and Tennessee, except that the gasoline which is deposited or stored in the bulk plant of the Company located at Mobile, Alabama is transported by means of pipe lines connecting said terminal at Mobile [fol. 99] with said Mobile bulk plant. Company has now and has had during the past five (5) years thirty-six (36) bulk plants located in Alabama, which consist of storage tanks and other facilities for keeping or storing the gasoline

which is to be sold and distributed either through retail service stations or direct to its customers. Such bulk plants are geographically distributed in the State of Alabama and are adjacent to railroad connections so that the gasoline which has been consigned to such plants for said terminals can be easily unloaded from the tank cars to the storage tanks or containers located at such bulk plants. Bulk plants of the Company are located in the State of Alabama as follows:

Bulk Plant	County	Bulk Plant	County
Alexander City	Tallapoosa	Gadsden	Etowah
Anniston	Calhoun	Guntersville	Marshall
Athens	Limestone	Haleyville	Winston
Atmore	Escambia	Huntsville	Madison
Birmingham	Jefferson	Jackson	Clarke
Blocton	Bibb	Linden	Marengo
Brewton	Escambia	Mobile	Mobile
Clanton	Chilton	Montgomery	Montgomery
Cullman	Cullman	Opelika	Lee
Decatur	Morgan	Opp	Covington
Demopolis	Marango	Ozark	Dale
Dothan	Houston	Reform	Pickens
Enterprise	Coffee	Selma	Dallas
Eufaula	Barbour	Sheffield	Colbert
Evergreen	Conecuh	Troy	Pike
Foley	Baldwin	Tuscaloosa	Tuscaloosa
Ft. Deposit	Lowndes	Tuskogee	Macon
Ft. Payne	DeKalb	Winfield	Marion

Since prior to January 1, 1930 Company has either owned, operated or has been interested in the operation of service stations at which gasoline is sold at retail to the public within the State of Alabama as follows:

A—Company Operated Service Stations, which are stations either owned or leased to the Company and are operated by salaried employes of the Company; the title to the gasoline handled through such stations remains in the Company until it is sold and delivered at retail to the Com- [fol. 100] pany's customers.

B—Consignment Service Stations, which are stations originally owned or leased to the Company and later leased or sub-leased by Company to individual operators. These stations are operated under contracts entered into between

the Company and the operator of such stations, under the terms of which contracts all of the gasoline which is delivered by the Company into the tanks or other containers located on the premises of said stations, is owned by the Company until such gasoline is sold at retail to the customers who purchase same. The owners or operators of the Consignment Service Stations never acquire any interest in or title to said gasoline but the title passes direct from the Company to the retail customer. Each owner or operator of such station is paid by the Company a commission on each gallon of gasoline of the Company sold or delivered through the station at which he is located.

C—Independent Dealer Service Stations are stations to which the Company makes deliveries of gasoline into the tanks or containers located on the premises of such stations and the title to such gasoline at the time of such delivery passes from the Company to the owner or operator of such station and the owner or operator then sells and delivers the gasoline at retail to the public.

All of the three (3) classes of service stations above described consist of underground storage tanks and pumps connected therewith and other facilities for the storage and selling of gasoline at retail to the public. All of the gasoline which was and is deposited in the tanks or other containers of the above mentioned retail service stations is first taken from bulk plant stations of the Company and transported by means of tank trucks or tank wagons from such bulk plants and delivered into the tanks or containers located on the retail service station premises.

[fol. 101] VII

During the period from January 1, 1930 through September 22, 1935 the Company withdrew from storage in Alabama and sold and delivered in said State to the United States, or its departments or agencies, 286,639.36 (Two Hundred Eighty-six Thousand Six Hundred Thirty-nine and Thirty-six One hundredths) gallons of gasoline. The deliveries made, respectively from the terminal of the Company at Mobile, Alabama, from Company Bulk Station Plants located in Alabama, from Company Operated Service Stations, from Company Consignment Service Stations and from Independent Dealer Service Stations during each of said calendar years were as follows:

Year	Mobile Terminal	Bulk Station Plants	Company Operated Service Stations	Consignment Service Stations	Independent Dealer Service Stations
1930.....	.....	14540	1008	.....	.....
1931.....	.....	17925	140	2247½	854
1932.....	.....	7933	....	4097	1446½
1933.....	.....	32459	....	4320½	640
1934.....	76221	87720	15	429	4618¼
1935.....	.....	14107	77	2234	3840
	.....	.....	....	.....	9767.61*
Total.....	76221	174684	1240	13328	21166.36

A schedule showing the amount of gasoline withdrawn from storage by the Company in Alabama and delivered in Alabama to the United States, or to its departments or agencies, during each calendar year from January 1, 1930 through September 22, 1935 is hereto attached, marked Exhibit "2" and is made a part hereof.

The gasoline described above as delivered from the Terminal of the Company at Mobile, Alabama amounted to Seventy-Six Thousand Two Hundred Twenty-one (76,221) gallons and was delivered FOB railroad cars at Mobile, Alabama, consigned to the United States Army, Quartermaster Corps, Fort McClellan, Alabama. All of this gasoline had previously been shipped in boats or barges from Port Arthur, Texas to the Mobile Terminal and there deposited [fol. 102] or stored in the tanks or containers of the Company at such terminal where it remained until it was withdrawn from storage into tank railroad cars on railroad tracks adjacent to said terminal. The title to said gasoline passed from the Company to the United States Army at the time it was loaded in said railroad tank cars at Mobile, Alabama. The sale and delivery of this gasoline to the United States Army was made under a previous contract which the Company had with the United States Army, copy of which contract is hereto attached marked Exhibit "3" and is made a part hereof.

The One Hundred Seventy-four Thousand Six Hundred Eighty-four (174,684) gallons of gasoline above described as delivered from Bulk Plants in Alabama to the United States, or to the various departments or agencies of the United States, was gasoline which had been originally shipped from the Company's refinery at Port Arthur, Texas in boats or barges of the Company to the Company's Terminals located at either Mobile, Alabama, Pensacola, Florida, or Millville, Florida. After the gasoline arrived at

these terminals it was loaded in railroad tank cars and shipped by railroad direct to the bulk stations in Alabama where it was unloaded and placed in tanks or containers in such bulk stations, except that the gasoline which was delivered from the Mobile Terminal to the Mobile Bulk Plant was transported by means of the aforesaid pipe lines. After the gasoline was delivered and stored in the Company's Bulk Plants in Alabama, it was not withdrawn from storage until placed in the Company's trucks or tank wagons, or in steel barrel containers, and delivered direct to the United States, or its departments or agencies, and the sole purpose of withdrawing such gasoline from the tanks or containers located in the Company's Bulk Plants was to make deliveries of such gasoline to the United States, or its said departments or agencies, under contracts which had previously been entered into between the Company and the [fol. 103] United States, or its departments or agencies. In some instances where the gasoline was withdrawn from storage at the said bulk station plants and loaded on trucks or tank wagons, the tanks on such vehicles contained gasoline to be delivered to parties other than the United States, its departments or agencies. A copy of a written contract entered into between the Company and the United States for the deliveries of said gasoline from said Bulk Plants is hereto attached, marked Exhibit "4" and is made a part hereof. A number of other similar contracts for deliveries of gasoline from bulk station plants, except as to dates and amounts, have been entered into between the Company and the United States since January 1, 1930, and deliveries thereunder by the Company are included in the above mentioned figures. Some of the deliveries from the Bulk Plant stations were made pursuant to previous oral contracts entered into between the Company and the United States, or its departments or agencies.

The One Thousand Two Hundred Forty (1,240) gallons of gasoline above described as being delivered from Company Operated Service Stations and the Thirteen Thousand Three Hundred Twenty-eight (13,328) gallons of gasoline above described as being delivered from Company Consignment Service Stations to the United States, or its departments or agencies, was gasoline which had originally been shipped by the Company's boats or barges from the Company refinery at Port Arthur, Texas, to the Company ter-

minals at Mobile, Alabama; Pensacola, Florida, or Millville, Florida and after its arrival at such terminals it was loaded on railroad cars or in boats and shipped to the various Bulk Station Plants in Alabama where it was unloaded and stored in the Bulk Station Plant tanks or containers, [fol. 104] except that the delivery from the Mobile Terminal to the Mobile Bulk Plant was made by pipe lines in the manner aforesaid. Thereafter, such gasoline was withdrawn from storage at such Bulk Plants and delivered in tank trucks or in tank wagons of the Company to the tanks or containers located on the respective premises of such Company Operated or Company Consignment Service Stations. The representatives or employes of the various United States departments or agencies obtained gasoline from such Service Stations by driving the automobiles, trucks or other vehicles belonging to, or being operated by, such departments or agencies into the Service Stations and requesting the Service Station attendants to fill the fuel tanks attached to such vehicles with the desired amount of gasoline. The Service Station attendants would then withdraw the gasoline from the tanks or containers located on said premises and place the desired quantities in the said fuel tanks. All of such purchasers of gasoline, before making such purchases, presented to the Service Station attendants identification cards or other credentials, showing that they were entitled to purchase such gasoline for the United States, or its departments or agencies, and practically all of the gasoline sold and delivered in this manner was delivered under previous contracts, which the Company had with the United States, or its departments or agencies and the amount of gasoline so delivered would be charged to the United States, or the department or agency, for whose account it was delivered and at the end of each calendar month the United States, or its department or agency would, upon being billed for the gasoline so purchased, pay the purchase price of same to the Company.

The Twenty-one Thousand One Hundred Sixty-six and Thirty-six One Hundredths (21,166.36) gallons of gasoline above described as being delivered through Independent Dealers was handled in the same manner that the gasoline [fol. 105] was handled through Company Operated and Company Consignment Stations until the gasoline was deposited into the tanks or containers located at the Independ-

ent Dealer Stations, at which time title to such gasoline passed to the owner or operator of such Independent Station. When an employe or representative from the United States, its department or agency, drove a vehicle into such Independent Dealer Station, upon his presenting identification card or other credentials showing that he was entitled to purchase gasoline for the United States, or such department or agency, the Independent Dealer would withdraw from storage and place into the fuel tank of such vehicle the desired number of gallons of gasoline and would take from such person a receipt, in duplicate, signed by such person, showing the amount of gasoline so purchased and delivered and when a truck driver employe of the Company would next make deliveries of gasoline to the Independent Dealer at his station in Company trucks from a Bulk Plant of the Company, such truck driver employe would deliver without charge to such Dealer an amount of gasoline equivalent to the gasoline previously delivered by the Independent Dealer to the employe or representative of the United States, or department or agency thereof. The truck driver would then deliver to the accounting department of the Company the receipts showing the amount delivered by the Independent Dealer to the employe or representative of the United States, or its department or agency, and the Independent Dealer would not be charged by the Company with the gasoline so delivered to replace the deliveries made by such Independent Dealer to the United States, its department or agency. The Independent Dealer would then be credited by the Company with the same margin of profit that he would have made if he had made a sale of such gasoline to third parties not connected with the United States. These deliveries were made on a credit basis under arrangements or contracts which the Company had with the [fol. 106] United States, or the said departments or agencies, and at the end of each calendar month the Company would bill the department or agency for whose account the deliveries had been made through such Independent Stations and would attach to the bill so rendered one of the duplicate receipts signed by the employe or representative of the United States, or department or agency thereof, at the time such gasoline was sold and delivered and such bill would be paid to the Company in due course. All of the gasoline, which was originally delivered by the Company to

the owner or operator of an Independent Dealer Station, was billed or charged to such Independent owner or operator, but none of the gasoline which was delivered to such Independent Dealer or operator to replace the gasoline which had been previously delivered by such Independent Operator to the United States Government, or department or agency thereof, in the manner aforesaid was ever billed or charged to said operator. All of said deliveries so made by the Independent Dealers were made under arrangements between the Company and said operators and were made for the account of the Company under contracts which the Company had with the United States or its departments or agencies, and with the understanding that the Company would replace all gasoline so delivered in the manner aforesaid. The Company in its monthly reports to the State Tax Commission included in the amount of gasoline which was shown as delivered and sold to the United States or its departments or agencies during the preceding month the quantity of gasoline which had been handled through the Independent Service Stations in the manner above stated and delivered to the United States or its departments or agencies.

Copies of contracts between the Company and the United States under which deliveries of gasoline were made to the United States, its departments or agencies, from Company Controlled, Company Consignment and Independent Dealer Service Stations are hereto attached, marked Exhibits [fol. 107] "5" and "6" respectively, and are made a part hereof. Other deliveries from such Service Stations were made under contracts of similar import between the same or other officials of the United States, except the dates of duration and the quantities of gasoline to be delivered thereunder were different.

VIII

In every instance where gasoline was sold and delivered by the Company to the United States or a department or agency thereof in the State of Alabama, the Company received and filed in its office a Tax Exemption Certificate showing the date of the purchase, the amount of gasoline purchased and the department or agency purchasing same and the Certificate was signed by the person making the purchase. A copy of a Tax Exemption Certificate actually

executed and now in the files of the Company is hereto attached, marked Exhibit "7", and is made a part hereof. All of the other Tax Exemption Certificates are in substantially the same form as the one attached hereto, except that appropriate blanks were filled in to properly identify the transaction which it evidenced. These certificates were prepared and printed by the United States and were and are furnished by the United States to each of its departments or agencies authorized to purchase gasoline or other petroleum products and have been and are now in use in every state in the United States.

The United States has since prior to January 1, 1930 required the Company to furnish it with a receipted invoice showing the amount of gasoline delivered on each occasion, the date of such delivery and the department or agency for whose account it was delivered and that such receipts be signed by the employe or representative of the United States or said department or agency actually receiving de- [fol. 108] livery of such gasoline and his title or the capacity in which he received same. For every sale and delivery of gasoline to the United States, or department or agency thereof in Alabama by the Company, except the shipments which were made from the Mobile Terminal to the United States Army, Fort McClellan, Alabama, above mentioned, the Company has received from the person actually receiving the gasoline such a form of receipt acknowledging that he has received the said gasoline. Duplicate copies of all receipts, following the month in which they were received by the Company, were forwarded by the Company to the United States or its departments or agencies, and the Company has been paid for all of the gasoline described in said receipts except that delivered within the past thirty or sixty days. The duplicate copies which were forwarded by the Company to the United States or to its departments or agencies were copies containing the original signatures of the person actually receipting for said gasoline.

IX

The Company had, since the date of the decision of the United States Supreme Court in the case of Panhandle Oil Company vs. State of Mississippi, 277 U. S. 318, filed with the State Tax Commission at Montgomery, Alabama on or before the 20th day of each calendar month a report on

forms furnished by the State Tax Commission, showing the amount of gasoline on which the Company was liable for a tax on account of transactions within the State of Alabama during the preceding month and in separate columns or spaces showing the amount of gasoline which had been sold in the State of Alabama to the United States or its departments or agencies. During said period neither the State of Alabama nor any of its officials or representatives have ever prior to the month of June, 1935 made claim or demand that the Company was liable to the State of Ala- [fol. 109] bama for the said excise taxes on account of sales of gasoline to or withdrawals from storage of gasoline which subsequently was sold to the United States or its departments or agencies and the Company has not since said decision paid or offered to pay to the State of Alabama any taxes on account of any said transactions. Copies of the various forms of reports or returns made to the State Tax Commission on forms furnished to the Company by it since January 1, 1930 are attached hereto and made a part hereof. The form for the reports to be filed with the State Tax Commission by oil companies doing business in Alabama during said period was changed. Exhibit "8" is the form first furnished by the State Tax Commission during the said period to the Company. Exhibit "9" is the next form furnished which was first used by the Company covering transactions during the month of July, 1931. The form next furnished by the State Tax Commission to the Company was first used by the Company in September, 1931 and is hereto attached, marked Exhibit "10". The form next furnished by the State Tax Commission to the Company was for the month of January, 1932, a copy of which form is hereto attached, marked Exhibit "11". The next form furnished by the State Tax Commission was for the month of July, 1934 and a copy of this form is hereto attached, marked Exhibit "12". The next form was for the month of January, 1935 and a copy of this form is hereto attached, marked Exhibit "13", and this is the form now being used by the Company. The State Tax Commission also furnished its Form GA 2½, which was to be attached to the above mentioned returns beginning June, 1932. A copy of this form is hereto attached, marked Exhibit "14" and is made a part hereof. Copies of returns made by the Company and attached hereto as Exhibits are the actual

returns made by the Company for the months indicated thereon, and the Company, during the months that each form was in effect, filed similar reports with the State Tax Commission, except that the blanks in said forms were [fol. 110] properly filled in to correctly show and identify the sales and transactions of the Company during the months which they respectively covered.

The auditors of the State Tax Commission have since prior to January 1, 1930, made audits of the books and records of the Company, and since the Tax Exemption Certificates have been in use since 1930 have also examined each of such certificates. These examinations were made at approximate three-month intervals and neither the auditors nor any other person connected with the State of Alabama have ever made claim, since the decision by the United States Supreme Court in said Panhandle Oil Company case until June, 1935, that the Company owed the State of Alabama any taxes on account of the transactions with the United States or its departments or agencies as evidenced by such Tax Exemption Certificates.

The State Tax Commission has advised the Company and other oil companies doing business in Alabama from time to time that independent retail dealers who bought their gasoline in Alabama on a basis of "tax paid" could not accept the Tax Exemption Certificates and that the State intended to claim that the excise tax on all gasoline handled in this manner was legally due and payable to the State. A copy of letter dated August 2, 1933 from A. B. Tucker, Chief Clerk, Gasoline Tax Department, State Tax Commission, addressed to Mr. F. L. Tosch, The Texas Company, Atlanta, Georgia, is hereto attached, marked Exhibit "15" and is made a part hereof. A copy of a communication date January 24, 1934 from the State Tax Commission which was received by the Company, is hereto attached, marked Exhibit "16". A copy of letter from A. B. Tucker, Chief Clerk, Gasoline Tax Department, State Tax Commission, to Mr. F. L. Tosch, Chief Accountant, The Texas Company, Atlanta, Georgia, dated January 29, 1934, is hereto attached, marked Exhibit "17" and made a part hereof. A [fol. 111] copy of letter from A. B. Tucker, Chief Clerk, Gasoline Tax Department, State Tax Commission, addressed to The Texas Company, Atlanta, Georgia, dated November 15, 1934, is hereto attached, marked Exhibit "18" and made

a part hereof. A copy of letter from A. B. Tucker, Chief Clerk, Gasoline Tax Department, The State Tax Commission, to F. L. Tosch, Chief Accountant, The Texas Company, Atlanta, Georgia, dated January 8, 1935, is hereto attached, marked Exhibit "19" and made a part hereof. A copy of letter from A. B. Tucker, Chief Clerk, Gasoline Tax Department, State Tax Commission, to F. L. Tosch, Chief Accountant, The Texas Company, Atlanta, Georgia, dated January 15, 1935, is hereto attached, marked Exhibit "20" and made a part hereof. A copy of letter dated March 11, 1935 from A. B. Tucker, Chief Clerk, Gasoline Tax Department, State Tax Commission, to H. L. Sessions, The Texas Company, Mobile, Alabama, is hereto attached, marked Exhibit "21" and made a part hereof. A copy of communication dated July 9, 1935, from A. B. Tucker, Chief Clerk, Gasoline Tax Department, State Tax Commission and forwarded to The Texas Company is hereto attached, marked Exhibit "22" and made a part hereof.

X

The Company has since the effective date of the 1927 Excise Tax Acts shown in its reports under separate headings gasoline which was sold in the State of Alabama and gasoline which was withdrawn in the State of Alabama for use other than for sale. No reports were made by the Company on the gasoline sold or intended for sale until the time that the title to such gasoline actually passed from [fol. 112] the Company to the purchaser thereof, and no report has even been made on gasoline withdrawn for use other than for sale until the time that such gasoline was actually withdrawn for such other use. This has been the uniform practice employed by other oil companies selling and withdrawing from storage gasoline within the State of Alabama and the State Tax Commission with knowledge of such practice has never prior to June, 1935 insisted that the transactions in the State of Alabama be reported in any other manner or the tax paid on account of such transactions in any different way than in the manner herein stated and as appears from the forms of returns hereto attached. The Company has paid all said excise taxes due to be paid to the State of Alabama with respect to all gasoline withdrawn from storage in Alabama for use other than for sale and with respect to all gasoline sold in said State, except that it has not paid any taxes with respect to withdrawals

from storage of gasoline sold to the United States or its departments or agencies, or with respect to sales of gasoline to such parties, since the decision in said Panhandle Oil Company case.

XI

Gasoline is a highly volatile and inflammable liquid substance and it is necessary to keep same in closed metal tanks or containers. When gasoline of the seller is stored in storage tanks or containers located in Alabama, before said gasoline can be delivered into storage tanks or containers or in the fuel tanks of vehicles of purchasers thereof, it is necessary to first withdraw such gasoline from storage from the tanks or containers of the seller.

XII

A number of the agencies or departments of the United States purchasing gasoline in the State of Alabama are transacting the business of such agencies or departments in every county in the State of Alabama, but such agencies or [fol. 113] departments do not have storage tanks or containers or other facilities for the storing of gasoline in all of such counties or at such points where gasoline may from time to time be needed by such agencies or departments. Due to the lack of such storage facilities, such departments or agencies purchase or otherwise obtain gasoline at such points where they have not storage facilities, from retail service stations or from other third parties which may be located at the point where such gasoline is needed or desired by such agencies or departments.

XIII

The Company is not and has not stored gasoline in the State of Alabama, except the gasoline stored by the Company in its tanks, containers and other equipment and sold to persons or parties in Alabama, or sold in interstate commerce from points in Alabama to other states, or except the gasoline stored by the Company for use in its own trucks or other vehicles used in its operations in the State of Alabama. The Company has never stored gasoline in the State of Alabama for the account of other parties.

XIV

The Company has entered into a contract with the Treasury Department, Procurement Division, Washington, D. C.,

designated as Contract TPS-8068, Region No. 2, under the terms of which the Company is require to make tank car deliveries FOB Mobile, Alabama, to the Quartermaster, United States Army, Fort McClellan, Alabama, and also to make deliveries of gasoline FOB Mobile, Alabama, consigned to the Quartermaster, United States Army, Maxwell Field, Alabama, and also deliveries of gasoline FOB Mobile, Alabama, to Tennessee Valley Authority, Wilson Dam, Alabama. This contract covers the requirements that each of these agencies or departments of the United States may re-
[fol. 114] quire from the period from October 1, 1935 thru December 30, 1935. A copy of this contract is hereto attached, marked Exibit "23" and is made a part hereof.

The Company has also entered into a contract with the United States Department of the Interior, which contract is designated as No. IS-1959, under the terms of which the Company is required to make deliveries thru retail service stations to the United States Department of the Interior, the Administrative Division of the Bureau of Reclamation, the Public Works Administration, the Bureau of Indian Affairs, and such other bureaus of the Department of the Interior as may from time to time desire to purchase under said contract or the requirements which said departments or agencies of the United States may need or desire to purchase in Alabama during the period from October 1, 1935 thru June 30, 1936. A copy of this contract is hereto attached, marked Exhibit "24" and is made a part hereof.

Executed in duplicate on this the 23rd day of October, 1935.

John S. Coleman, Attorneys of Record for Plaintiff, The Texas Company. A. A. Carmichael, Atty. General; Frontis H. Moore, Asst. Atty. General; Peyton Bibb, Thomas J. Judge, Richard L. Rives, Attorneys of Record for Defendants. Bradley, Baldwin, All & White, of Counsel.

[fol. 115] Copy

EXHIBIT 1

July 14, 1933.

Hon. Page S. Bunker, State Forester, Capitol:

Under the authority of the Pan Handle Oil case, gasoline purchased by the government to be used in emergency conservation work is not subject to tax.

Opinion by Assistant Attorney General Moore.

DEAR SIR:

I have your letter of June 27th in which you state:

"Under the provisions of the Act of Congress entitled 'An Act for the relief of unemployment through the performance of useful public work, and for other purposes' approved March 31, 1933, a Federal agency known as the Emergency Conservation Work has been established with headquarters at Washington, D. C. The activities of this Federal Bureau are carried on in Alabama in cooperation with the State Commission of Forestry. In connection with the Emergency Conservation Work in this State the Federal Government uses certain gasoline motor vehicles. The manner in which such vehicles are employed is fourfold as follows:

"1. Vehicles owned by the Federal Government and used exclusively upon Government work.

"2. Vehicles leased by the United States from private owners for strictly official Federal use.

"3. Vehicles owned by the State but loaned to the Federal Government by the State Commission of Forestry for strictly official Federal use.

"4. Cars privately owned by Federal employees and used on strictly official Federal work at a fixed rate of reimbursement per mile.

[fol. 116] "Your opinion is requested as to whether the provisions of State laws as to the levying and payment of State and County taxes on gasoline, oil and grease apply to the vehicles engaged exclusively in Federal work under any or all of the above four captions."

In my opinion the answer to each of your questions is dependent on whether or not the gasoline is bought by the Government and used for governmental purposes. If this be true, under the authority of the Pan Handle Oil case, I am of the opinion that it is not subject to tax. If the gasoline is purchased by anyone other than the Government, I am of the opinion that it is subject to the tax.

Yours very truly, Thomas E. Knight, Jr., Attorney General.

[fol. 117]

EXHIBIT "2"

Departments	Mobile Terminal	Delivered Bulk Stations	From Service Stations	Consignments	Independent Dealers	Total
Unidentified	.....	4259*	197	.....	616½	.....
U. S. Shipping Board	.....	500	....	.....	.....	.....
Alabama Transient Bureau	.....	7265	....	.....	304	.....
Alabama Relief Administration	.....	3100	....	.....	.....	.....
U. S. Consular Service	.....	.....	....	9	.....	.....
U. S. Marine Hospital #13	.....	.....	855	20	.....	.....
Mississippi Warrior Service	.....	4005	....	.....	.....	.....
U. S. Public Health Service	.....	1655	....	11	.....	.....
U. S. Veterans Hospital #91	.....	2080	....	.....	.....	.....
U. S. Coast Guard Service	.....	10095	....	.....	316	.....
U. S. Naval Station—Pensacola	.....	55	....	.....	.....	.....
R. O. T. C. Unit—Alabama Polytechnic Institute	.....	300	....	.....	.....	.....
U. S. Engineers Service	.....	6036	....	.....	.....	.....
U. S. Collector of Customs	.....	.....	96	.....	.....	.....
U. S. Department of Commerce	.....	6983	15	4287½	1157½	.....
U. S. Lighthouse Service	.....	3710	....	.....	.....	.....
U. S. Observation Squadron	.....	720	....	.....	.....	.....
Nitrate Plant #2	.....	3000	....	.....	.....	.....
U. S. Department of Interior	.....	19	....	502	3319¾	.....
U. S. War Department	76221	44136	....	2717½	4493.36	.....
U. S. Department of Agriculture	.....	.....	77	605½	1037	.....
Finance Officer—Maxwell Field	.....	5815	....	.....	.....	.....
U. S. Department of Justice	.....	.....	....	1469½	4885	.....
U. S. Navy Department	.....	.....	....	3030	379	.....
U. S. Quartermaster—Maxwell Field	.....	3750	....	.....	.....	.....
Federal Barge Line	.....	960	....	.....	.....	.....
U. S. Treasury Department	.....	10140	....	96	2727½	.....
U. S. Post Office Department	.....	.....	....	384	86	.....
U. S. Veterans Administration	.....	.....	....	25	8	.....
Public Works Administration	.....	.....	....	.....	1310¾	.....
U. S. Naval Reserve	.....	50	....	.....	.....	.....
U. S. Veterans Bureau	.....	.....	....	46	16	.....
U. S. Government—Washington, D. C.	.....	125	....	.....	.....	.....
Civilian Works Administration	.....	19633	....	.....	480	.....
Civilian Conservation Corps	.....	1470	....	.....	.....	.....
Emergency Conservation Works	.....	11735	....	.....	5	.....
Tennessee Valley Authority	.....	21787	....	125	25	.....
	76221	174684	1240	13328	21166.36	286639.36

* Deliveries made to U. S. Government at Mobile, Tuscaloosa and Birmingham but records have been destroyed.

Exhibit No. 7

Marine Hospital,
Mobile, Alabama

CERTIFICATE — U. S. GOVERNMENT MOTOR FUELS TAX EXEMPTION — T- 2688

Date Dec 31, 1934

I certify that I have this —— purchased 30 gallons of Gasolene (Gasoline, benzol, kerosene, etc.) at 10½ per gallon, and —— quarts of ———— (Alcohol, oil, etc.) at ———— per quart, exclusive of State or local tax, for use on official business of the United States Government, from The Texas Co. (Name and location of dealer) Alabama (State), and the quantity purchased was actually delivered to automobile and truck (Automobile, truck, motorcycle, airplane, or boat) bearing license plate number ———— or delivered at Hospital Marine Hospital, Mobile, Alabama under my direct supervision.

U. S. TREASURY DEPARTMENT
(Branch of the service for which purchased)

P. L. Collier
(Name of purchaser)

Senior Surgeon
(Title)

Medical Officer in Charge

Where dealers will not accept this certificate in lieu of the State or local tax, receipts must be obtained in duplicate.

ORIGINAL.—To be retained by dealer, who will accept this only when purchaser is identified by Standard Form No. 45, Identification Card.

Standard Form No. 44—Approved by the President, June 13, 1930. 10—1953

118

129

Form B-2 Received

Exhibit No. 8

Form B-2 Received

STATE OF ALABAMA

THE STATE TAX COMMISSION

MONTHLY GASOLINE TAX RETURN

Name THE TEXAS COMPANY

Address ATLANTA, GEORGIA.

Month of MARCH 1931. 19 - 1930

INSTRUCTIONS

1. This return must be filed with the State Tax Commission, at Montgomery, not later than the 20th of the month next succeeding the month in which sales and withdrawals are made.

2. Sales and withdrawals must be entered separately on lines 5 and 7 of statement opposite.

3. This return is required of all gasoline sold or withdrawn from storage in Alabama, except that it is not required from filling stations when such stations purchase gasoline from distributors in this State or from distributors outside the State when such distributors report and pay tax on sales in Alabama.

TO BE ACCOUNTED FOR	Gallons of Gasoline
1. On hand beginning of month	1,140,894
2. Received during month	1,632,499
3. Gain, if any, from temperature change	
4.	
Total to be Accounted For	2,773,393
ACCOUNTED FOR	
5. Sales for month within State of Alabama	1,516,576
6. Sales for month outside State of Alabama	2,825
7. Withdrawn from storage in Alabama for any purpose except sale	6,595
8. Loss, if any, from temperature change	7,642
9. Sold to U.S. Government. No Tax	560
10. On hand at end of month	1,239,195
Total Accounted For	2,773,393

CALCULATION OF TAX

1,516,576 Gallons sold within State (line 5 above) @ 4 cents per gallon	$ 60,663.04
6,595 Gallons withdrawn for use (line 7 above) @ 4 cents per gallon	263.80
1,523,171	$60,926.84
Check enclosed for $ 60,919.00 in payment total tax	
Less 196 Gals. Returned to Stock	7.84
THIS QUESTION MUST BE ANSWERED	$60,919.00

Are sales and withdrawals given in lines 5 and 7 above made from more than one place of business? Yes

If so, give list of places where sold and number of gallons sold at each place.

Location of Business.	Gallons Sold and Withdrawn
See attached	

(If this space insufficient, attach typewritten list of places of business to this return)

GEORGIA AFFIDAVIT

State of ~~Alabama~~

FULTON County.

I, F.L.Tooch, Chief Accountant
(Name of person making affidavit)

the _____ of the THE TEXAS COMPANY
(This line to be filled in when return made by corporation)

whose address is ATLANTA, GEORGIA
first being duly sworn, depose and say upon oath that the statement here submitted is full, true and correct to the best of my knowledge and belief.

Chief Accountant

Subscribed and sworn to before me this the 13th. day of April, 1931. Fulton County State of Georgia, 1930

Notary Public

119

130

Form B-6
Received

Exhibit No. 9

STATE OF ALABAMA

THE STATE TAX COMMISSION

EXHIBIT 9

MONTHLY GASOLINE TAX RETURN

Name THE TEXAS COMP NY

Address ATL NTA, GEORGIA.

Month of JULY 1, 193

INSTRUCTIONS

1. This return must be filed with the State Tax Commission, at Montgomery, not later than the 20th of the month next succeeding the month in which sales and withdrawals are made.

2. Sales and withdrawals must be entered separately on lines 5 and 7 of statement opposite.

3. This return is required of all gasoline sold or withdrawn from storage in Alabama, except that it is not required from filling stations when such stations purchase gasoline from distributors in this State or from distributors outside the State when such distributors report and pay tax on sales in Alabama.

TO BE ACCOU. TED FOR	Gallons of Gasoline
1. On hand beginning of month	1,296,151
2. Received during month	1,775,751
3. Gain, if any, from temperature change	24,696
4.	
Total to be Accounted For	3,096,578
ACCOUNTED FOR	
5. Sales for month within State of Alabama	1,795,130
6. Sales for month outside State of Alabama	3,300
7. Withdrawn from storage in Alabama for any purpose except sale	6,318
8. Loss, if any, from temperature change Leakage & Evaporation	6,870½
9. Sold to U.S.Government.Non Taxable	1,025
10. On hand at end of month	1,284,654½
Total Accounted For	3,096,578

CALCULATION OF TAX

1,795,130 Gallons sold within State (line 5 above) @ 4 cents per gallon	$ 71,805.20
6,318 Gallons withdrawn for use (line 7 above) @ 4 cents per gallon	252.72
Check enclosed for $ in payment total tax	72,057.92
Returned to Stock 326 Gals.) @	13.04
THIS QUESTION MUST BE ANSWERED	72,044.88

Are sales and withdrawals given in lines 5 and 7 above made from more than one place of business? Yes

If so, give list of places where sold and number of gallons sold at each place.

Location of Business.	Gallons Sold and Withdrawn
See attached	

(If this space insufficient, attach typewritten list of places of business to this return)

AFFIDAVIT

State of Alabama, GEORGIA
FULTON County.

I, F.L.Tooke Chief Accountant
(Name of person making affidavit)

the of the The Texas Company
(This line to be filled in when return made by corporation)

whose address is Atlanta, Georgia
first being duly sworn, depose and say upon oath that the statement here submitted is full, true and correct to the best of my knowledge and belief.

Chief Accountant

Subscribed and sworn to before me this the 19th, day of August 1931 193

Notary Public in and for the State of Alabama.
Fulton County State of Georgia.

BROWN PRINTING CO., MONTGOMERY, 1930

Form Revised C. 8-31-2M

Exhibit No. 10

STATE OF ALABAMA

THE STATE TAX COMMISSION

EXHIBIT 10

MONTHLY GASOLINE TAX RETURN

Name THE TEXAS COMPANY

Address ATLANTA, GEORGIA.

Month of SEPTEMBER 1931

INSTRUCTIONS

1. This return must be filed with the State Tax Commission, at Montgomery, not later than the 20th of the month next succeeding the month in which sales and withdrawals are made.

2. Sales and withdrawals must be entered separately on lines 5 and 7 of statement opposite.

3. This return is required of all gasoline sold or withdrawn from storage in Alabama, except that it is not required from filling stations when such stations purchase gasoline from distributors in this State or from distributors outside the State when such distributors report and pay tax on sales in Alabama.

TO BE ACCOUNTED FOR	Gallons of Gasoline
1. On hand beginning of month	1,377,944
2. Received during month	1,593,157
3. Gain, if any, from temperature change	19,733
4. " from adjustments	496
Total to be Accounted For	2,991,330
ACCOUNTED FOR	
Loss from adjustments	19,724
5. Sales for month within State of Alabama	1,641,571½
6. Sales for month outside State of Alabama	2,101
7. Withdrawn from storage in Alabama for any purpose except sale	5,469
8. ~~Loss, theory, from temperature change.~~ Transferred	10,465
9. Sales to U.S.Government	22,884
10. On hand at end of month	1,289,115½
Total Accounted For	2,991,330

CALCULATION OF TAX

1,641,571½	Gallons sold within State (line 5 above) @ 5 cents per gallon	$ 82,078.58
5,469	Gallons withdrawn for use (line 7 above) @ 5 cents per gallon	273.45
	Check enclosed for $ ____ in payment total tax	$82,352.03
	Less Case, returned	33.61
		$82,318.42

THIS QUESTION MUST BE ANSWERED

Are sales and withdrawals given in lines 5 and 7 above made from more than one place of business? Yes

If so, give list of places where sold and number of gallons sold at each place. See attached

LOCATION OF BUSINESS

	Gallons Sold & Withdrawn		Gallons Sold & Withdrawn

(If this space insufficient, attach typewritten list of places of business to this return)

RECEIPTS

Date	Car No.	Gallons	Date	Car No.	Gallons

(If this space insufficient, attach typewritten list of shipments.)

AFFIDAVIT

GEORGIA

State of ~~Alabama~~
FULTON County.

I, F. L. Tosch, Chief Accountant
(Name of person making affidavit)

the ____ of the THE TEXAS COMPANY, whose address is
(This line to be filled in when return made by corporation)

ATLANTA, GEORGIA, first being duly sworn, depose and says upon oath that the statement here submitted is full, true and correct to the best of my knowledge and belief.

Chief Accountant

Subscribed and sworn to before me this the 19th. day of October 1931

Notary Public in and for ~~the State of Alabama~~
Fulton County State of Georgia.

* 824 Gals. @ 4¢ per Gal. 4.96 ~~193 Gals. @ 5¢ per Gal. 8.65~~ = 33.61

121

132

Revised Form

Exhibit No. 11

12-31-10M

STATE OF ALABAMA

EXHIBIT //

THE STATE TAX COMMISSION

MONTHLY GASOLINE TAX RETURN

Name THE TEXAS COMPANY

Address ATLANTA GEORGIA.

Month of JANUARY 1932

Mail this to GASOLINE DEPARTMENT, State Tax Commission, Montgomery, Ala.

INSTRUCTIONS

1. This return must be filed with the State Tax Commission, at Montgomery, not later than the 20th of the month next succeeding the month in which sales and withdrawals are made.

2. Sales and withdrawals must be entered separately on lines 5 and 7 of statement opposite.

3. This return is required of all gasoline sold or withdrawn from storage in Alabama, except that it is not required from filling stations when such stations purchase gasoline from distributors in this State or from distributors outside the State when such distributors report and pay tax on sales in Alabama.

4. Line 6 must be filled out by all dealers or distributors carrying stock of gasoline in Alabama, giving name of state into which sales are made.

5. No credit will be allowed on sales to U. S. Government unless proof is submitted that such sales were for strictly Governmental Instrumentalities.

TO BE ACCOUNTED FOR	Gallons of Gasoline
1. On hand beginning of month	1,191,797
2. Received during month	1,344,303
3. Gain, if any, from temperature change	780
4.	
Total to be Accounted For	2,536,880
ACCOUNTED FOR	
5. Sales for month within State of Alabama	1,268,269
6. Sales for month in State of Ga. Fla. 1500 Sales non-taxable	3,894 35,200
7. Withdrawn from storage in Alabama for any purpose except sale	5,146½
8. Loss, if any, from temperature change	609
9. Transferred 2,477 Adjustments 9904	12,581½
10. On hand at end of month	1,211,380
Total Accounted For	2,536,880

CALCULATION OF TAX	
1,268,269 Gallons sold within State (line 5 above) @ 5 cents per gallon	$63,413.45
5,146½ Gallons withdrawn for use (line 7 above) @ 5 cents per gallon	257.33
Check enclosed for $63,634.53 in payment total tax	$63,670.78
Less 688 Gals. 5¢ per Gal. returned	34.25
	$63,636.53

THIS QUESTION MUST BE ANSWERED

Are sales and withdrawals given in lines 5 and 7 above made from more than one place of business? Yes

If so, give list of places where sold and number of gallons sold at each place. See attached

LOCATION OF BUSINESS

	Gallons Sold & Withdrawn		Gallons Sold & Withdrawn

(If this space insufficient, attach typewritten list of places of business to this return)

RECEIPTS

Date	Car No.	Gallons	Date	Car No.	Gallons

(If this space insufficient, attach typewritten list of shipments.)

GEORGIA

AFFIDAVIT

State of ~~Alabama~~, FULTON County.

I, F. L. Tosch, Chief Accountant (Name of person making affidavit),

~~the~~ of the THE TEXAS COMPANY (This line to be filled in when return made by corporation), whose address is ATLANTA GEORGIA., first being duly sworn, depose and says upon oath that the statement here submitted is full, true and correct to the best of my knowledge and belief.

Chief Accountant

Subscribed and sworn to before me this the 19th day of Feb. 1932 193

Notary Public in and for ~~the State of Alabama~~

Fulton County State of Georgia.

BROWN PRINTING CO., MONTGOMERY, ALA.

122

133

Revised Form [illegible]

Exhibit No. 12

1-54-5M

STATE OF ALABAMA

THE STATE TAX COMMISSION

EXHIBIT 12

MONTHLY GASOLINE TAX RETURN

Name THE TEXAS COMPANY

Address Atlanta, Georgia

Month of July, 193 4

Mail this to GASOLINE DEPARTMENT, State Tax Commission, Montgomery, Ala.

INSTRUCTIONS

1. This return must be filed with the State Tax Commission, at Montgomery, not later than the 20th of the month next succeeding the month in which sales and withdrawals are made.

2. This return is required on all gasoline sold or withdrawn from storage in Alabama, except that it is not required from filling stations when such stations purchase gasoline from distributors in this State or from distributors outside the State when such distributors report and pay tax on sales in Alabama.

3. Line 6 must be filled out by all dealers or distributors carrying stock of gasoline in Alabama, giving name of state into which sales are made.

4. No credit will be allowed on sales to U. S. Government unless proof is submitted that such sales were for strictly Governmental Instrumentalities.

TO BE ACCOUNTED FOR	Gallons of Gasoline
1. On hand beginning of month	675126
2. Received during month [illegible] total	1486068
[illegible]	
3. Gain, if any, from temperature change	19067
4.	
Total to be Accounted For	2180261
Sold to U. S. Government.....	34807
ACCOUNTED FOR	
5. Sales and withdrawals for month within State of Alabama	1497928
6. Sales for month within State of Ga. & Fla.	11698
7. [illegible]	2630
8. [illegible]	7977
9. Leakage & Evaporation	10410
10. On hand at end of month	695295
Total Accounted For	2180261

1497928 Less 150 gals. ret'd to Stock.

CALCULATION OF TAX

1497778 Gallons sold within State and withdrawn for use during month @ 6c per gallon $ [illegible]

Check enclosed for $ 89,866.68 in payment of total tax

THIS QUESTION MUST BE ANSWERED

Are sales and withdrawals given in lines 5 and 7 above made from more than one place of business? Yes

If so, give list of places where sold and number of gallons sold at each place.

LOCATION OF BUSINESS

	Gallons Sold & Withdrawn		Gallons Sold & Withdrawn
	See Attached.		

(If this space insufficient, attach typewritten list of places of business to this return)

DETAILED RECEIPTS

Date	Car No.	Gallons	Date	Car No.	Gallons

(If this space insufficient, attach typewritten list of shipments.)

AFFIDAVIT

State of GEORGIA
FULTON County.

I, J. T. Sessions
(Name of person making affidavit)

the Asst. Chief Accountant of the THE TEXAS COMPANY, whose address is
(This line to be filled in when return made by corporation)

Atlanta, Georgia, first being duly sworn, depose and says upon oath that the statement here submitted is full, true and correct to the best of my knowledge and belief.

Asst. Chief Accountant

Subscribed and sworn to before me this the 20th day of Aug. 193 4

Notary Public [illegible]

BROWN PRINTING CO., MONTGOMERY, ALA., 1934

Revised Form Ga-1

Exhibit No. 13

STATE OF ALABAMA

EXHIBIT 13

THE STATE TAX COMMISSION

MONTHLY GASOLINE TAX RETURN

Name THE TEXAS COMPANY

Address Atlanta, Georgia

Month of January 1935

Mail this to GASOLINE DEPARTMENT, State Tax Commission, Montgomery, Ala.

INSTRUCTIONS

1. This return must be filed with the State Tax Commission, at Montgomery, not later than the 20th of the month next succeeding the month in which sales and withdrawals are made.

2. This return is required on all gasoline sold or withdrawn from storage in Alabama, except that it is not required from filling stations when such stations purchase gasoline from distributors in this State or from distributors outside the State when such distributors report and pay tax on sales in Alabama.

3. Line 6 must be filled out by all dealers or distributors carrying stock of gasoline in Alabama, giving name of state into which sales are made.

4. No credit will be allowed on sales to U. S. Government unless proof is submitted that such sales were for strictly Governamental Instrumentalities.

TO BE ACCOUNTED FOR	Gallons of Gasoline
1. On hand beginning of month	675,500½
2. Received during month taxable	1,510,686
Received during month tax paid	
3. Gain, if any, from temperature change	576
4.	
Total to be Accounted For	2,186,762½
ACCOUNTED FOR	
5. Sales and withdrawals for month within State of Alabama	1,384,448½
6. Sales for month in State of Ga. & Fla.	12,214
7. Sales to others less tax	108,844
8. Loss, if any, from temperature change	1,828
9. Sales to U. S. Government / Leakage and evaporation	5,735 / 2,181
10. On hand at end of month	672,499
Total Accounted For	2,186,762½

1,384,448½ plus 1,223 error in recap

CALCULATION OF TAX

1,385,671½ Gallons sold within State and withdrawn for use during month @ 6c per gallon $ 83,140.29

Check enclosed for $ 83,140.29 in payment of total tax

THIS QUESTION MUST BE ANSWERED

Are sales and withdrawals given in lines 5 and 7 above made from more than one place of business? yes

If so, give list of places where sold and number of gallons sold at each place.

LOCATION OF BUSINESS

	Gallons Sold & Withdrawn		Gallons Sold & Withdrawn
ATTACHED			

(If this space insufficient, attach typewritten list of places of business to this return)

DETAILED RECEIPTS

Date	Car No.	Gallons	Date	Car No.	Gallons
	ATTACHED				

(If this space insufficient, attach typewritten list of shipments.)

AFFIDAVIT

State of GEORGIA

FULTON County.

I, F. L. Torch, Chief Accountant
(Name of person making affidavit)

~~Xx~~ of ~~Xx~~ THE TEXAS COMPANY, whose address is
(This line to be filled in when return made by corporation)

Atlanta, Georgia, first being duly sworn, depose and says upon oath that the statement here submitted is full, true and correct to the best of my knowledge and belief.

Chief Accountant

Subscribed and sworn to before me this the 19th day of February 1935

Notary Public

124

135

Exhibit No. 14

DETAILED GASOLINE REPORT BY THE TEXAS COMPANY EXHIBIT 14

For Month of January, 1935 Atlanta, Georgia,

Location of Distribution or Service Stations	On Hand First of Month	Sold Within State	Sold Without State	Withdrawn For Other Use	On Hand End of Month
162 Alexander City	18653	31119			12071
171 Anniston	27610	75339		244	34901
174 Athens	9006	25190		18	16120
178 Atmore	14852	20324	1646		9303
239 Birmingham	63364	216920		1574	75453
267 Brewton	9208	9355	3800	65	12122
268 Clanton	9468	24784		33	10192
269 Cullman	16634	26500		10	14371
270 Decatur	18218	33578			22784
272 Demopolis	11622	14515		31	15436
273 Dothan	23542	30897		96½	24440½
279 Enterprise	14514	19223			11136
282 Eufaula	10537	18190	3318	11	12466
283 Evergreen	11725	11879½		20	7507½
285 Blocton	8218	11820		5	5075
298 Ft. Deposit	17326	14171½		30½	11204
308 Ft. Payne	17954	13574	3450	15	17069
309 Foley	7111	22658			9338
310 Gadsden	29382	72422		31	33944
311 Guntersville	17162	25236			16208
312 Haleyville	15598	6994		4	16700
313 Huntsville	30024	43934		22	25363
319 Jackson	7253	10560		6	6839
320 Linden	14784	8630			14259
321 Mobile	9215	78542		748	17265
325 Montgomery	57665	129800		787	31952
328 Opelika	13870	32728		50	13409
329 Opp	11788	26284		30	9853
330 Ozark	16663	15857			16956
331 Reform	16872	13600			11408
332 Selma	25375	33528		40	24174
334 Sheffield	17858	37505		32	14449
335 Troy	19174	48489		37	20733
337 Tuscaloosa	19085	50283		35	32225
339 Tuskegee	14890	17802		11	13222
340 Winfield	8001	14007		16	10126
360 Birmingport	39955				31329
386 Decatur SS#2	1326½	3607½		33	1096
D/O Sales		40522			
Mobile Terminal		45		245	
New Orleans District		5132			
Interstate from:					
16 Cedartown, Ga.		286			
38 Columbus, Ga.		27839			
77 LaGrange, Ga.		3694			
137 West Point, Ga.		14805			
Totals	675500½ ✓	1380168½ ✓	12214 ✓	4280 ✓	672499

[fol. 126] Copy

EXHIBIT "15"

State of Alabama

The State Tax Commission

Montgomery

(Alabama Great Seal.)

Aug. 2, 1933.

Mr. F. L. Tosch, The Texas Co., Atlanta, Ga.

DEAR SIR:

Govt. Sales

In reply to your letter dated Aug. 1 will say that I ruled early in the Summer that the State gasoline and lubricating oil tax will apply on sales made to other than U. S. Government Agencies, and the exception could not be allowed in any case except where the purchaser presented standard form #44. This, even, only applies where the sale is made by a tax-paying dealer, such as The Texas Co., Gulf, Standard or some licensed independent who pays tax to this department. Sales made by independent retail dealers or authorized dealers who buy stock "tax paid" can not accept these certificates.

The Attorney General's Department has issued an opinion holding that "if the gasoline is bought by the Government and used for governmental purposes" it is exempt.

It appears from the ruling you quote as to exemption from Federal tax that the same might apply to the State tax. I will investigate this phase further.

I am taking the position that the gasoline tax money is used for the same purpose set out in the plans for forestry improvement—giving employment to the unemployed. The U. S. Government is spending the money clearing up forests simply to give work to idle hands. The gasoline tax money is used for the two-fold purpose of giving employment and improving the highways, which is different from the tax money collected for use in operating the ordinary governmental functions of the State.

For the present, persons who are authorized to issue standard forms #44 can get gasoline free in Alabama. Dealers

should know that issuance of these certificates by unauthorized persons might prove costly.

[fol. 127] Should a further study of the question warrant a change in the above, I shall immediately advise you. You may therefore collect the Alabama tax only on that part of gasoline sold in this State where the purchaser is unable to execute the exemption certificate.

Trusting we will some day be able to arrange a system by which no exemptions can be allowed, and thus close up one chance of leakage and unfair competition, I am,

Yours very truly, A. S. Tucker, Chief Clerk Gasolien-Tax Department.

[fol. 128] Copy

EXHIBIT "16"

State of Alabama

The State Tax Commission

Montgomery

(Alabama Great Seal.)

Jan. 24, 1934.

To all licensed dealers:

This is to advise that gasoline sales made to C. W. A. projects may be made less the State tax of 6¢ per gallon, provided the purchaser presents satisfactory evidence that the gasoline is strictly for use in U. S. Governmental work, bought on U. S. Government requisition. Proper certificate must be executed by purchaser for protection of the distributor. This certificate must set out that none of the gasoline thus bought is to be used, or was used, for other than U. S. Governmental activities.

The above ruling is made in the light of additional information received since the first request was made on this department.

First information obtained by this department tended to show that there were two classes of C. W. A. projects—One Federal and the other State or political subdivisions of the State.

Upon a further investigation, it was found that all of the C. W. A. projects are not only financed by the U. S. Government, but are supervised by agents of the U. S. Government. It was also learned that the material is bought on U. S. requisition, and labor as well as material, paid for with checks on the Federal fund, which at no time becomes State monies.

In view of the above, you may claim exemptions on all such sales and these claims will be allowed if proper proof is presented.

You, of course, understand, however, that no exemption can be allowed on sales made to individuals operating cars or trucks on mileage, hour or per diem basis. Also that no exemption can be allowed on sales made by retail dealers from tax paid stock.

Yours very truly, A. B. Tucker, Chief Clerk Gasoline Department.

ABT:W.

[fol. 129] Copy

EXHIBIT "17"

State of Alabama

The State Tax Commission

Montgomery

(Alabama Great Seal.)

Jan. 29, 1934.

Mr. F. L. Tosch, Chief Accountant, The Texas Company, Atlanta, Ga.

DEAR SIR:

Tax Exemptions

Your letter dated Jan. 27th received and carefully noted.

Since writing you on Dec. 27th I have made further investigations and find that practically all of the C. W. A. projects are supervised by Federal agents and that most, if not all the gasoline used is bought with U. S. Funds which, at no time, become State monies.

With this additional information I got out a circular letter ruling that such purchases can be listed as U. S. Sales and sold less the State tax. I am enclosing a copy of this circular.

Of course there are a few workers hired to work on certain construction projects who are furnishing their own truck or auto on a mileage, per diem or load basis. These purchase their own gasoline and oils at a price including the tax.

Now as to the P. W. A. So far no additional information has been received on these projects, but I am of the opinion that the only exemptions that can be allowed in these cases is on the gasoline sold to the officers travelling on U. S. Government expense, who are supplied with identification card No. 45 and exemption certificate No. 44. Gasoline used by municipalities, when bought from local dealers, will bear the tax although it may be used in constructing light plants or municipal buildings with funds loaned by the P. W. A. Advisory Board.

Trusting this clears the matter I am,

Yours very truly, A. B. Tucker, Chief Clerk, Gasoline Tax Department.

T.

[fol. 130] Copy

EXHIBIT "18"

The State of Alabama

The State Tax Commission

Montgomery

(Alabama Great Seal.)

Nov. 15, 1934.

The Texas Company, Atlanta, Ga.

GENTLEMEN:

According to information recently obtained, your bulk plant operators are accepting from Texaco service stations, not operated by The Texas Company, U. S. motor fuel exemption certificates and turning them in as sales to the U. S. Government by The Texas Company.

I will thank you to furnish this office with a statement covering all such transactions and remit the tax of 6¢ a gallon on all claims heretofore made for exemption on this class of sales.

From time to time in the past this department has ruled that sales made by service station operators who purchase gasoline stock "tax paid". In other words we have held that only those sales made by a tax-paying dealer are subject to exemption under the Supreme Court decision in the Pan Handle case, and then only when sales are made to the U. S. Governmental agents for essential governmental functions.

Under date of August 2, 1933, we wrote you as follows, among other things: "Sales made by independent retail dealers or authorized dealers who buy stock "tax paid" can not accept these certificates." When the sale is made to the filling station operator the Alabama tax accrues and subsequent sales are of no concern to the State. Exemptions can be allowed only on those sales made from company-owned gasoline to the Government's agent.

Your usual prompt attention will be appreciated.

Yours very truly, A. B. Tucker, Chief Clerk, Gasoline Tax Department.

[fol. 131] Copy

EXHIBIT "19"

State of Alabama

The State Tax Commission

Montgomery

(Alabama Great Seal.)

January 8, 1935.

Mr. F. L. Tosch, Chief Accountant, The Texas Company, Atlanta, Ga.

DEAR SIR:

Re: United States Motor Fuel Tax Exemption

This will acknowledge receipt of your letter dated January 7 requesting information as to how service station oper-

ators can handle United States tax exemption certificates No. 44 where sales of gasoline are made to Federal employees.

As stated heretofore, service station operators who buy their gasoline, tax paid, cannot handle these certificates. When a Federal employee calls on such a dealer for gasoline and tenders a motor fuel exemption certificate, the service station operator should decline to accept same and in lieu thereof give the Federal Agent a receipt in duplicate to cover the purchase of gasoline, which he should sell at a price including all cost and such profit as he sees fit to charge.

There is no law by which a Federal Agent can force a dealer to sell gasoline less the State tax where such dealer does not pay this tax direct to the State. He can, however, sell this gasoline less the local tax, if provision is made by the local taxing authority for such deduction.

Under the State law, there is no provision for refunds and we can only allow the exemption where the gas is bought from a tax-paying dealer.

Trusting this clears the matter in your mind, I am,

Yours very truly, A. B. Tucker, Chief Clerk, Gasoline Tax Department.

ABT/gc.

[fol. 132] Copy

EXHIBIT "20"

State of Alabama

The State Tax Commission

Montgomery

(Alabama Great Seal.)

Jan. 15, 1935.

Mr. F. L. Tosch, Chief Acct., The Texas Company, Atlanta, Ga.

DEAR SIR:

In further reference to making tax free sales of gasoline to U. S. agents, will say, by way of illustration:

If I operate a service station as the "Tuck Service Station" and make purchases from the Texas Co. with all taxes added to the invoice, I can not sell to the U. S. less the tax, as the privilege for which the tax is charged was exercised by you when you sold me the gasoline and no subsequent sales from that gasoline is taxable because the law specifically provides that the tax can only be collected once.

If I operate a service for you and your truck driver delivers gasoline into my custody for sale to the general public as your gasoline and only have to account to you for sales made from your stock, I can, as your employee, accept the Form 44 exemption certificates for you because the sale was not made until I delivered your gasoline into the fuel tank or other receptacle of the Government's.

In other words when the gasoline passes from you to a customer, the tax accrues, but it does not accrue when the gasoline only passes from one of your storage tanks to another and remains your property.

Trusting this clarifies the matter I am,

Yours very truly, A. B. Tucker, Chief Clerk, Gasoline Tax Department.

T.

[fol. 133] Copy

EXHIBIT "21"

State of Alabama

The State Tax Commission

Montgomery

(Alabama Great Seal.)

11 March, 1935.

Mr. H. L. Sessions, The Texas Company, Mobile, Alabama.

DEAR SIR:

In reply to your letter dated March 6th, will say that gasoline sold from a Company owned or a Company leased station, where the gasoline is the property of the Texas Oil Company, United States Standard Form S-44 can be accepted in lieu of the 6¢ tax.

It is immaterial to the State whether the gasoline is sold on commission or by salaried employees, just so long as the gasoline is the property of the Texas Oil Company when withdrawn from storage and delivered into the motor fuel tank of the car operated by an authorized representative of the United States Government.

If the gasoline delivered into the motor fuel tank of the car operated by a representative of the United States Government is sold from gasoline previously sold to the retail dealer, no exemption is allowable.

Ownership of the filling station has no bearing on the taxibility. The question hinges on the owner of the gas at the time it is withdrawn from the service station for delivery to the motorist.

Trusting this answers your question, I am, with personal good wishes,

Yours very truly, A. B. Tucker, Chief Clerk, Gasoline Tax Department.

ABT/ew.

[fol. 134] Copy

EXHIBIT "22"

State of Alabama

The State Tax Commission

Montgomery

(Alabama Great Seal.)

July 9, 1935.

To all dealers:

GENTLEMEN:

This is to advise that under an opinion issued by the Attorney General under date of July 5, 1935, gasoline sold to the United States Government can not be deducted from the taxable gallons sold or withdrawn from storage in Alabama, but must bear the State tax of 6¢ a gallon.

The Attorney General's opinion in brief says:

"The aggregate tax imposed by the several gasoline excise tax statutes is a privilege tax upon the storage, and consequent withdrawal from storage, of gasoline, which tax accrues upon amount at the time of withdrawal from storage, and it is, the mandatory duty of refiners, storers and distributors to compute and pay the tax as applicable to them on the basis of their withdrawals from storage. In computing and paying the several amounts of tax due by them, distributors, refiners, retail dealers, and storers not entitled to deduct from the basis of computation a number of gallons equal to the number of gallons of gasoline withdrawn from storage by them and sold to the United States Government in Alabama."

The above is for your information and guidance.

After a careful study of the above mentioned opinion, and the fact that the lubricating oil tax law is worded almost exactly like the gasoline tax Acts, it is my personal opinion that the same ruling will apply to both gasoline and lubricating oil sales.

Yours very truly, A. B. Tucker, Chief Clerk, Gasoline Tax Department.

ABT/ew.

[fol. 135] EXHIBIT 3

Standard Form No. 32.
Approved by the President, June 10, 1927.

Contract No. W626 qm—17730

Invitation for Bids No. 626-34-316

Office Identifying No. 9116

Standard Government form of Contract

(Supplies)

Bond $4,190.00—United States Fidelity & Guaranty Company.

Contractor.

New York General Depot,
1st Avenue & 58th Street,
Brooklyn, New York
Department

The Texas Company
Contractor

Contract for Motor Gasoline, Fuel Oil and Kerosene Oil.
Amount, $41,676.68

Place:
Schenectady General Depot, South Schenectady, N. Y.
New York Port of Embarkation, Brooklyn, N. Y.
Picatinny Arsenal, Picatinny, N. J.
Fort McClellan, Ala.
Barksdale Field, La.
Fort Schuyler, N. Y.
Fort Mott, N. J.
Post of San Juan, P. R.
Augusta Arsenal, Augusta, Ga.
New Orleans Q. M. Depot, New Orleans, La.
New York General Depot, Brooklyn, N. Y. (For Forts Wood and Slocum, N. Y.)
Fort Tilden, N. Y.
Cristobal, Canal Zone
Veterans' Adminstration Facility, Lyons, N. J.
Veterans' Adminstration Facility, Northport, L. I., N. Y.
Collector of Customs, N. Y. (For Custom Boats)

Contract for Supplies

This contract, entered into this 21st day of June, 1934 by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and The Texas Company, a corporation organized and existing under the laws of the State of Delaware, 135 East 42nd Street, of the City of New York, in the State of New York, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. Scope of this contract.—The contractor shall furnish and deliver

[fol. 136] Motor Gasoline, Fuel Oil, Bunker "C" and Kerosene Oil, at the destinations, in quantities, and

for the consideration stated in, and in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof and designated as follows: Schedules of Supplies "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", "L", "M", "N", "O", "P" and "Q", Specs. VV-G-101 for Motor Gasoline, 2-43D for Fuel Oil, Bunker "C" and VV-K-211 for Kerosene Oil.

Sheets No. 22 to 28, "Instructions to Bidders", and Sheet containing the Federal Tax, the Domestic Products and the NRA Code provisions.

Deliveries shall be made as follows: As called for by the consignees between July 1, 1934 and September 30, 1934.

Prices set forth herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon production, manufacture or sale of the supplies covered by this contract, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

Except as noted below or otherwise indicated herein all unmanufactured articles, materials, or supplies furnished under this contract shall have been mined or produced in the United States and all manufactured articles, materials, or supplies shall have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured, as the case may be, in the United States.

The contractor agrees that it will comply with each approved Code of Fair Competition to which it is subject and if engaged in any trade or industry for which there is no

approved Code of Fair Competition, then as to such trade or industry, with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act.

The United States shall have the right to cancel this con- [fol. 137] tract for failure to comply with this provision, and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor.

The contractor further agrees that where the supplies furnished are not mined, produced or manufactured in the United States the special or general Code of Fair Competition shall apply to that portion of the contract executed in the United States.

The contractor further agrees that it will not accept or purchase for the performance of this contract, or enter into any subcontracts for any articles, materials or supplies in whole, or in part, produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each Code of Fair Competition which relates to such articles, materials, or supplies or in case there is no approved Code for the whole or any portion thereof then, to that extent, with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act.

Schedule of Supplies "D"

Must be Filled in and Attached to all Quartermaster Corps Contracts for Supplies

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1. Contract number and date: W 626 QM-17730, Dated June 21, 1934.
2. Contracting officer, name: J. D. Goodrich, Major Q. M. C.
   Address: 1st Ave. & 58th St., Brooklyn, N. Y.
3. Contractor, name: The Texas Company,
   Address: 135 East 42nd St., New York, N. Y.
   Factory name and location: Refinery at Mobile, Ala.
4. F. O. B. Delivery and inspection points: Contractor's Refinery.
5. Articles or service: Inspection: At origin as to Quantity and quality.
   Final inspection and acceptance at destination.

Approx. Quantity	Unit	Description and specification	Unit Price	Est. Total
36950	Gals	Gasoline, Motor U. S. Govt. Spec. VV-G-101. Delivery to be made in Government or Commercial Tank cars	.07718	$2851.80

The price indicated on this schedule is the top price to be paid for gasoline during the duration of the contract. However, the gasoline will be billed by the contractor at the price in effect on the date of delivery or shipment, but in no event will exceed the price stated in this schedule.

Price to be paid for gasoline does not include State tax. Deliveries not meeting specifications will be returned to the contractor at his expense and contractor will be required to replace the quantities rejected with like quantities of specification quality, without cost to the U. S. Government.

[fol. 138] 6. Variations: Quantities listed hereon are subject to increase (or decrease of not to exceed —%.

7. Schedule of deliveries: Between July 1 and Sept. 30, 1934, as called for on delivery orders issued by the consignee.

7A. This contract is for general utilization at the station named herein: All calls on contractor or orders for delivery of supplies hereunder, issued by the consignee will contain the certificate as to availability of funds quoting the procurement authority number to be used in making payments.

8. Shipping directions—including packing and marking:

Quartermaster
Fort McClellan, Alabama,

Ship on Government bill of lading. When ready for shipment advise consignee and government bill of lading will be furnished.

Freight Rate $.01257762 per gallon.

9. Payment of bills: Render invoices in triplicate, quoting this contract number, to the Finance Officer Ft. McClellan, Ala., and who should furnish this office a copy of each voucher paid hereunder.

To insure prompt payment the original copy of the invoice should be certified as follows:

"Certified correct, payment not received.
—— —— (Name of Contractor)
By —— —— (Signer's name and title)."

10. Terms of Payment; Discount will be allowed for prompt payment as follows:
From and including date of delivery of supplies at destination 10 calendar days 1%; 20 calendar days — %; 30 calendar days — %.
11. Bond: Required. Name and address of guarantor(s) United States Fidelity and Guaranty Company, 75 William St., New York, N. Y. Amount, $285.00. Annual Bond No. —.
12. The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to procurement authority. See Par. 7A above. The available balance of which is sufficient to cover cost of same.
13. Serial number of Invitation for Bids RM 626-34-316 (Bid #17) opened 6/6/34.
14. Serial number of Requisition QM 533-237-34.

(The contract also contains provisions for the sale and delivery by the Texas Company to the United States of gasoline and other petroleum products in states other than Alabama, which provisions are, by agreement of the parties, eliminated from the record.)

[fol. 139] Standard Form No. 36

Standard Government Form of Continuation Schedule for Standard Form 31 or 33

(Supplies)

Instructions to Bidders on Motor Gasoline, Fuel Oil and Kerosene

The quantities specified in schedules are the estimated quantities for the three (3) months period from July 1st, 1934, to September 30, 1934, and quotations on this basis are requested:

General Conditions

Bids are invited for furnishing products of the grades specified at the places designated, during the period indicated above, to meet the needs of the various Governmental activities, in the form or forms of delivery stated in the schedule.

For deliveries to Government activities other than the Quartermaster Corps, U. S. Army, orders will be placed and inspection and payment will be made by the representative of the Government activity concerned.

For Quartermaster Corps activities delivery orders will be placed by The Quartermaster of the Port or Station where delivery is to be made, and the Finance Officer indicated on Schedule of Supplies or Purchase Order, together with Procurement Authority will be designated on the delivery order and bills will be required to be rendered, to Finance Officer designated for each shipment.

As it is impossible to determine the quantities of products of the kind or kinds, at the places and in the forms of delivery specified in this schedule, that will be required during the contract term, each bidder whose bid is accepted will be required to deliver such quantities under the item or items for which contract is awarded, that may be ordered during the contract term, except as otherwise indicated in bid. Supplies will be ordered from time to time in such quantities as may be needed. The estimates as to quantities listed in the schedule are given for information only, and will not relieve the Government of its obligation to order from contractors all of the products of the kinds and in the forms of delivery contracted for, that may, in the judgment of the ordering officers, be needed; and shall not in any case relieve the contractor of his obligation to fill all orders under any contract awarded him. Bids will be considered if made with a proviso that the total deliveries will not exceed a certain specified quantity, but no bid will be considered which provides that the Government shall guarantee to take any definite quantity.

The products mentioned below shall be furnished in strict accordance with their respective specifications, viz:

Gasoline, U. S. Motor—Federal Specification VV-G-101
Motor Fuel V—Federal Specification VV-M-571

Oil, Fuel—Bunker A, B and C,—U. S. Army Specification 2-43D and Diesel Engine (Navy Standard)
Oil, Fuel, Distillates—U. S. Army Specification 2-74
Oil, Kerosene—Federal Specification VV-K-211

Inspection

All Gasoline, Fuel Oil and Oil, Keresone, etc., delivered in tank cars shall be tested for quality by the contractor prior to loading and contractor shall immediately forward to consignee duplicate copies of test report showing that the product conforms to the specifications, and all such shipments will be sampled upon arrival at destination and [fol. 140] sample forwarded to Government agency designated to make test, or at the discretion of the receiving activity. Arrangments may be made to have a Government inspector make inspection at point of origin before shipment.

Deliveries other than in tank cars will be samples and inspected only when, in the opinion of the receiving officer, products meeting the specifications are not being delivered.

Determination of Quantity

The unit of quantity will be the gallon of 231 cubic inches.

Deliveries will be corrected to quantity at 60 degrees Fahrenheit in accordance with Bureau of Standards Supplement to Circular No. 154, "Abridged Volume Correction Table for Petroleum Oils."

Contractor will be required to furnish with each tank car, delivery ticket showing number of gallons, temperature of product and outage (in dome or shell as the case may be) when loaded and measured.

Containers

When delivery in drums or steel barrels is specified, it is intended that contractor's drums or barrels will usually be supplied. The contents of contractor's drums or barrells upon delivery will be immediately transferred to Government owned containers and the contractor's drums or barrels returned immediately to the contractor's agent or to the contractor by and at the expense of the Government.

If drums or barrels are not returned to the contractor

or to a common carrier for shipment to the contractor within — days after receipt by the consignee, they will be invoiced to and paid for by the Government at $— per drum or barrel. If, however, such steel drums or barrels in good condition are, after having been paid for, returned by the Government at the expense of the Government, within 12 months after date of delivery of the gasoline, etc., the contractor will allow $— for each drum or barrel returned.

If at any station it is desired to have gasoline, etc., delivered in Government owned drums or barrels, it will be so stated in the schedule and when orders are placed for this form of delivery, Government owned drums or barrels will be delivered by and at the expense of the Government to the contractor's plant or station, the subsequent delivery of the filled drums or barrels from the contractor's plant to the Government activity to be by and at the expense of the contractor.

Where delivery in tank cars is specified, it is intended that Government owned tank cars will be used. If at any time Government tank cars are not available, the contractor will be required to furnish tank cars at no additional cost, and will be required to state on delivery ticket the capacity of the car, when shell is full the number of gallons per inch in dome and the number of gallons for each of the first four inches out of shell. This information must be furnished with each shipment in other than Government-owned tank cars, so that the receiving officer may be in a position to determine the quantity of gasoline, etc., in cars upon arrival. If a contractor's tank car is received more than four inches out of shell, the receiving officer will guage the car and determine the number of gallons by correspondence with contractor.

Bidder must insert in the above blank spaces the price per steel drum or barrel to be charged for all such drums or barrels not returned during the period mentioned, and the price allowed to the Government when drums or barrels are returned.

Any drums or barrels furnished by the contractor must be in accordance with Interstate Commerce Commission Specifications No. 5.

Deliveries

To be delivered as herein required, at the points named, [fol. 141] in the manner specified, and free of all delivery expenses.

Each delivery must be accompanied by delivery tickets.

Orders will provide for delivery within a specified number of days after date of order. The time necessary for order to reach contractor will be taken into consideration, and as much time as possible will be allowed the contractor for making delivery. It is to be understood, unless otherwise stated in bid, that contractors shall be in a position to make tank wagon deliveries within 48 hours after receipt of order, and in the case of shipments to deliver to carrier within 48 hours after receipt of order or the spotting of tank cars at the contractor's plant.

All bids will be considered as f. o. b. points indicated in the schedule, unless stated otherwise by the bidder. If point of delivery stipulated by bidder is different from the point of delivery indicated in the Schedule, the cost of transportation and handling to the point of delivery stipulated in the schedule will be considered in making awards.

The Government reserves the right to accept or reject any or all bids.

Bidding

Quotations may be submitted on any or all items as bidder may elect.

Bids must be submitted at definite prices per gallon, and shall be exclusive of state or municipal taxes. (See Decision of the Supreme Court in the case of the Panhandle Oil Company v. Mississippi, May 14, 1928.)

Bids quoting differentials only, based on market prices, will not be considered. No sum in excess of the bid price will be paid by the United States.

Any person (as such term is defined in the Code of Fair Competition for the Petroleum Industry) selling petroleum or the products thereof to the United States, or any agency therof, or to any state or territory or political subdivision or agency thereof, or to the District of Columbia, or to any municipality, must comply with the provisions of Rule 3 of Article V of the Code of Fair Competition for the Petroleum Industry except that a top price may be bid. In no event shall the top price [redacted] lower than 25% more than the

posted price on the date the bid is made, less discounts authorized under Rule 3 of Article V. No contract containing a top price provision shall be made for a period exceeding three months. Nothing herein contained shall be construed to allow discounts from the posted price at filling stations.

Bids must be executed in triplicate.

Alternate bids will not be accepted unless asked for.

There is no objection to bidders removing sheets of this schedule which contain items in which they are not interested, but must indicate on Standard Form No. 31, pertaining to this bid, the sheet numbers that have been removed. No sheets containing instructions or conditions will be removed.

Should supplies or materials be offered by a bidder by sample, brand name, catalog reference or model number, when in this invitation for bids, a U. S. Army, Federal or tentative specification is given for the supplies or material required, the sample so offered, or the brand name, catalog reference or model number specified by the bidder will be disregarded, and he will be held to have bid upon supplies conforming with the specifications given in the invitation for bids.

When an item of supplies or materials is followed by a designated U. S. Army, Federal or tentative specification and a bid sample is elsewhere required in this invitation [fol. 142] for bids to be furnished by the bidder, the award will be made upon the basis of the specification given and not upon the bid sample furnished by the bidder.

Failure to Perform

If the contractor fails to complete deliveries under calls within the time agreed upon, the Government reserves the right to purchase the delinquent portion in the open market, charging the increased cost, if any, to the contractor.

Bid Guaranty

When totaling $1,000.00 or more, bids must be accompanied by security in the amount of 10% of the aggregate price, in the form of: (a) a certified check payable to the Contracting Officer shown on Invitation for Bids, attached or (b) United States bonds; or (c) a bid bond executed by approved sureties on Standard Form 24, unless annual bid bond of sufficient unobligated amount has been fur-

nished, reference to same should be made here, showing No. — Amount —, Expiration date —— —, ——.

Sealed bids in triplicate will be received in this office until the date and hour named in the accompanying schedules and then publicly opened for furnishing the materials and supplies called for therein.

Envelopes containing bids must be sealed and marked in the upper left-hand corner with the name and address of the bidder and in the lower left hand corner the number of the Invitation to Bid and date and hour of opening and addressed to the purchasing agency named below, affixing sufficient postage.

Quartermaster Supply Officer
New York General Depot
1st Avenue & 58th Street
Brooklyn, New York.

Whenever the conditions relating to discounts that may be offered by signers of an approved code of fair competition under the National Industrial Recovery Act or an approved marketing agreement under the Agricultural Adjustment Act are in conflict with the conditions started in Standard Form No. 31 hereof, relating to discounts, the conditions appearing in codes of fair competition and marketing agreements will be accepted in lieu of those specified on Sheet 1 of this form.

Prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the Material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes are imposed or changed by Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture or sales of the supplies covered by this bid, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on voucher (or invoice) as separate items.

"It is hereby certified that in the event award is made to the undersigned, the unmanufactured articles, materials, or supplies furnished the United States will have been mined or produced in the United States, and the manufactured articles, materials, and supplies will have been manu-

factured in the United States all from articles, materials, or supplies mined, produced or manufactured as the case may be, in the United States, except as noted below or otherwise indicated in this bid."

_____

By_____

Bidder must sign this certificate.

[fol. 143] No bid (or quotation) will be considered or accepted unless it includes or is accompanied by the following certificate duly executed by the bidder:

"It is hereby certified that the undersigned is complying with, and will continue to comply with, each approved code of fair competition to which it is subject, and if engaged in any trade or industry for which there is no approved code of fair competition, then, as to such trade or industry it has become a party to and is complying with, and will continue to comply with, an agreement with the President under Section 4(a) of the National Industrial Recovery Act."

_____

_____

(Bidder must sign this certificate)

"Any person falsely certifying as to compliance as aforesaid who submits any such proposal, bid, contract, or sub-contract, or who accepts any purchase order, may be punished as provided in Section 10(a) of the National Industrial Recovery Act by a fine of not to exceed five hundred dollars ($500.00) or imprisonment not to exceed six (6) months, or both, and in event of any such false certification by any such person, any contract, sub-contract, or purchase order to which he is party secured by or in furtherance of any such proposal or bid may be cancelled by the other party thereto, and the unfinished portion thereof completed at the expense of the person guilty of such false certification and his sureties, if any.

"The contractor (vendor) agrees that it will comply with each approved Code of Fair Competition to which it is subject and if engaged in any trade or industry for which there is no approved Code of Fair Competition, then as to such trade or industry, with an agreement with the

President under Section 4(a) of the National Industrial Recovery Act.

"The United States shall have the right to cancel this contract for failure to comply with this provision, and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor.

"The contractor further agrees that where the supplies furnished are not mined, produced or manufactured in the United States the special or general Code of Fair Competition shall apply to that portion of the contract executed in the United States.

"The contractor further agrees that it will not accept or purchase for the performance of this contract or purchase order, or enter into any sub-contracts for any articles, materials or supplies in whole, or in part, produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each Code of Fair Competition which relates to such articles materials, or supplies, or in case there is no approved Code for the while or any portion thereof then, to that extent, with an agreement with the President under Section 4(a) of the National Industrial Recovery Act."

Exemption under NRA and PRA:

The following is quoted from Executive Order No. 6354 dated October 23, 1933.

"The provisions of the President's Reemployment Agreement, issued July 27, 1933, shall not be held to apply to employers engaged only locally in retail trade or in local service industries (and not in a business in or affecting interstate commerce) who do not employ more than five persons and who are located in towns of less than 2,500 population (according to the 1930 Federal Census) which are not in the immediate trade area of a city of larger population, except so far as such employers who have signed the President's Reemployment Agreement desire to continue to comply with the terms of said agreement after the date of this order; and this release of such employers who have heretofore signed the President's Re- [fol. 144] employment Agreement shall be further extended so as to release to the same extent all such employers of obligations not voluntarily assumed under the

provisions of a code of fair competition approved by the President. This exemption is intended to relieve small business enterprises in small towns from fixed obligations which might impose exceptional hardships; but it is expected that all such enterprises will conform to the fullest extent possible with the requirements which would be otherwise obligatory upon them."

Bidders are informed that when exemption is claimed under the above quoted provisions of the Executive Order of October 23, 1933, they will submit with their bid a certificate containing the following:

I (we) am (are) engaged only locally in retail trade (or in local service industries) and not in a business in or affecting interstate commerce. I (we) do not employ more than five persons and am (are) located in a town of less than 2,500 population (according to 1930 Federal Census.) to wit:

_____

(Name of town or village and State)

which is not in the immediate trade area of a city of larger population.

_____

(Full name of bidder)

_____

(Official capacity)

By _____

(Sign in ink)

[fol. 145] Standard Form No. 32

Sheet 2

(Supply Contract)

Article 2. Changes.—Where the supplies to be furnished are to be specially manufactured in accordance with Government drawings and specifications, the contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings or specifications, except Government Master Specifications. Changes as to shipment and packing of all supplies may also be made as above provided. If such changes cause an in-

crease or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or chief of bureau. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 12 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the contract as changed.

Article 3. Extras.—Except as otherwise herein provided, no charge for extras will be allowed unless the same have been ordered in writing by the contracting officer and the price stated in such order.

Article 4. Inspection.—(a) All material and workmanship shall be subject to inspection and test at all times and places and, when practicable, during manufacture. The Government shall have the right to reject articles which contain defective material or workmanship. Rejected articles shall be removed by and at the expense of the contractor promptly after notification of rejection.

(b) If inspection and test, whether preliminary or final, is made on the premises of the contractor or subcontractor, the contractor shall furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient inspections and tests required by the inspectors in the performance of their duty. All inspection and tests by the Government shall be performed in such a manner as not to unduly delay the work. Special and performance tests shall be as described in the specifications. The Government reserves the right to charge to the contractor any additional cost of inspection and test when articles are not ready at the time inspection is requested by the contractor.

(c) Final inspection and acceptance of materials and finished articles will be made after delivery, unless otherwise stated. If final inspection is made at a point other

than the premises of the contractor or a subcontractor, it shall be at the expense of the Government except for the value of samples used in case of rejection. Final inspection shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud. Final inspection and acceptance or rejection of the materials or supplies shall be made as promptly as practicable, but failure to inspect and accept or reject materials or supplies shall not impose liability on the Government for such materials or supplies as are not in accordance with the specifications. In the event public necessity requires the use of materials or supplies not conforming to the specifications, payment therefor shall be made at a proper reduction in price.

Article 5. Delays—Damages.—If the contractor refuses or fails to make deliveries of the materials or supplies within the time specified in Article 1, or any extension thereof, the Government may terminate the right of the contractor to proceed with deliveries or such part or parts thereof as to which there has been delay. In such event, the Government may purchase similar materials or supplies in the open market or secure the manufacture and delivery of the materials and supplies by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby: Provided, That the contractor shall not be charged with any excess cost occasioned the Government by the purchase of materials or supplies in the open market or under other contracts when the delay of the contractor [fol. 146] in making deliveries is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather but not including delays caused by subcontractors: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and extent of delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal within thirty days by the contractor to the head of the department concerned, whose decision on

such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

Article 6. Responsibility for supplies tendered.—The contractor shall be responsible for the articles or materials covered by this contract until they are delivered at the designated point, but the contractor shall bear all risk on rejected articles or materials after notice of rejection. Where final inspection is at point of origin but delivery by contractor is at some other point, the contractor's responsibility shall continue until delivery is accomplished.

Article 7. Increase or decrease.—Unless otherwise specified, any variation in the quantities herein called for, not exceeding 10 per cent. will be accepted as a compliance with the contract, when caused by conditions of loading, shipping, packing or allowances in manufacturing processes, and payments shall be adjusted accordingly.

Article 8. Payments.—The contractor shall be paid, upon the submission of properly certified invoices or vouchers, the prices stipulated herein for articles delivered and accepted or services rendered, less deductions, if any, as herein provided. Unless otherwise specified, payments will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the contractor, payments for accepted partial deliveries shall be made whenever such payments would equal or exceed either $1,000 or 50 per cent. of the total amount of the contract.

Article 9. Additional security.—Should the surety upon any bond that is furnished for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government.

Article 10. Officials not to benefit.—No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 11. Covenant against contingent fees.—The contractor warrants that he has not employed any person to

solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 12. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties hereto as to such questions of fact. In the meantime, the contractor shall diligently proceed with performance.

[fol. 147] Article 13. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved or his assistant.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

Article 14. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

The United States of America, by (Signed) J. D. Goodrich (Official title:) Major, Q. M. Corps. The Texas Company, Contractor, by (Signed) R. L. Saunders, 135 East 42nd Street, New York, N. Y.

Two witnesses: R. H. Stoyle. Frank J. Shipman.

I, W. G. Elicker, certify that I am the Assistant Secretary of the corporation named as contractor herein; that R. L. Saunders, who signed this contract on behalf of the

contractor, was then Manager of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(Signed) W. G. Elicker, Asst. Secretary. (Corporate Seal.)

[fol. 148] Directions for Preparation of Contract

1. This form or Standard Form No. 33 shall be used whenever a formal contract is entered into for the procurement of supplies and manufactured articles, whether stock or special, except coal, but their use will not be required in foreign countries.

2. There shall be no deviation from this Standard Contract Form, except as provided for in these instructions, without prior approval of the Director of the Bureau of the Budget obtained through the Interdepartmental Board of Contracts and Adjustments. Where interlineations, deletions, additions, or other alterations are permitted, specific notations of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to deviate from the standard form. Deletion of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations."

3. The blank space of Article 1 is intended for the insertion of a statement of supplies to be furnished or work done, together with time and place of performance and price, or for the enumeration of papers which contain the necessary data.

4. If it is deemed necessary to include an article on patents, the Invitation to Bidders shall so state and the following article be used:

Article.—Patents.—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any copyrighted or uncopyrighted composition, secret process, patented or unpatented invention, article, or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specifications, the use of which the contractor does not control.

5. If it is deemed necessary to provide for liquidated damages for delay, the following article shall be substituted for Article 5 and prospective bidders so advised:

Article.—Delays—Liquidated damages.—If the contractor refuses or fails to make delivery of the materials or supplies within the time specified in Article 1, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine, and in lieu thereof the contractor shall pay to the Government, as fixed, agreed, and liquidated damages for each calendar day of delay in making delivery, the amount as set forth in the specifications or accompanying papers, and the contractor and his sureties shall be liable for the amount thereof: Provided, however, That the Government reserves the right to terminate the right of the contractor to proceed and to purchase similar material or supplies in the open market or secure the manufacture and delivery thereof by contract or otherwise, charging against the contractor and his sureties any excess cost occasioned the Government thereby, together with liquidated damages accruing until such time as the Government may reasonably procure similar material or supplies elsewhere: Provided further, That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine, restrictions, strikes, freight embargoes, and unusually severe weather but not including delays caused by subcontractors: Provided further, That the contractor shall, within ten days from the beginning of any such delay, notify the contracting officer in writing of the causes of the delay, who shall ascertain the facts and extent of the delay and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

6. If approval of the contract is required before it shall become binding, the following article must be added:

Article—Approval.—This contract shall be subject to the [fol. 149] written approval of —— —— and shall not be binding until so approved.

(Contracts subject to approval are not valid until approved by the authority designated to approve them, and the contractor's copy will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.)

7. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriations, amount of bond, designation of place of inspection, as well as other administrative details, shall be as directed by the department to which the contract pertains.

8. All blank spaces must be filled in or ruled out. The contract must be dated, and the bond must bear the same or subsequent date.

9. An officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney or other evidence of his authority to act on behalf of the contractor.

10. If the contractor is a corporation, one of the certificates following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

11. The full name and business address of the contractor must be inserted, and the contract signed with his usual signature. Typewrite or print name under all signatures to contract and bond.

Exhibit No. 4

Standard Form No. 32
Approved by the President
June 10, 1927

E.C.F. Contract No. W626E.C.F.-379

Invitation for Bids no. 626-35-72. Office Identifying No. 2437.

STANDARD GOVERNMENT FORM OF CONTRACT

(SUPPLIES)

Bond waived.

NEW YORK GENERAL DEPOT,
1ST AVENUE & 58TH STREET,
BROOKLYN, NEW YORK.
(Department)

Filed Oct. 24-1935
O. D. Street, Jr.
Clerk

The Texas Company
(Contractor)

Contract for Motor Gasoline and Kerosene Oil. Amount, $ 18,996.12

Place Various Reforestation Camps throughout States in the Fourth Corps Area.

APPROVED: By Director, Emergency Conservation Work, July 24, 1934.

CONTRACT FOR SUPPLIES

THIS CONTRACT, entered into this 1st day of October, 1934, by the United States of America, hereinafter called the Government, represented by the Contracting officer executing this contract, and The Texas Company, a corporation organized and existing under the laws of the State of Delaware, 135 East 42nd Street, of the city of New York, in the State of New York, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. Scope of this contract.--The contractor shall furnish and deliver Motor Gasoline and Kerosene Oil, in the quantities, at the various Reforestation Camps throught the States of Alabama, Florida, Georgia, Mississippi, North Carolina and South Carolina, for the Civilian Conservation Corps, and for the consideration stated in and in strict accordance with the specifications, Shedules and drawings, all of which are made a part hereof and designated as follows:
Schedules of Supplies "A", "B", "C", "D", "E", and "F",
Specs. VV-G-101 for Motor Gasoline and VV-K-211 for Kerosene Oil,
Sheets No. 17 to 22, "Instructions to Bidders", and
Sheet containing the Federal Tax, the Domestic Products and the NRA Code provisions.

Deliveries shall be made as follows: As called for by the Camp Commanders, between October 1, 1934 and December 31, 1934.

Page 3 of this contract is identical with page 3 of the contract attached

150

167

as Exhibit 3 and is eliminated from the record by agreement of the parties.

War Department
Q. M. C. Form 309 OFFICE IDENTY. 2437.
Authorized Nov. 16, 1927

SCHEDULE OF SUPPLIES "A"

Must be filled in and attached to all Quartermaster Corps contracts for supplies.

1. Contract number and date W 626 ECF - 379, DATED OCT. 1, 1934.
2. Contracting officer, name J. D. GOODRICH, MAJOR Q.M.C.
   Address 1ST AVE & 58TH ST., BROOKLYN, N.Y.
3. Contractor, name THE TEXAS COMPANY
   Address 135 EAST 42ND STREET, NEW YORK, NEW YORK.
   Factory name and location
4. F. O. B. delivery and inspection points DESTINATION
5. Articles or services: INSPECTION: TO BE HANDLED BY CONSIGNEE.

APPROX. Quantity	Unit	Description and Specification	Unit Price	EST. Total
2500	GALS.	GASOLINE, MOTOR, U.S. GOVT. SPEC. VV-G-101. DELIVERY TO BE MADE IN TANK WAGONS DIRECT TO CAMP. (FIRE CHIEF)	.1783	$445.75

NO DELIVERIES OF LESS THAN 50 GALLONS SHALL BE MADE.
PRICE TO BE PAID FOR GASOLINE DOES NOT INCLUDE STATE TAX.
TANK WAGON DELIVER: CONTRACTOR'S POSTED TANK WAGON PRICE AT TIME OF DELIVERY SUBJECT TO DISCOUNTS BELOW, WITH MAXIMUM PRICES AS SHOWN IN THIS SCHEDULE.

DISCOUNTS:

DELIVERIES:	"FIRE CHIEF" ABOVE 60 OCTANE
FROM 3,000 GALS. TO 10,000 GALS. PER MONTH	.01
OVER 10,000 GALS. PER MONTH	.02

NO DISCOUNT MAY BE PAID OR ALLOWED AT TIME OF DELIVERY BUT SAME SHALL BE DUE AND PAYABLE WITHIN 25 DAYS FROM THE END OF THE MONTH IN WHICH DELIVERIES ARE MADE.
THE TERM "MONTH" AS USED IN THIS CONTRACT FOR THE PURPOSE OF DISCOUNTS MEANS A CALENDAR MONTH. DISCOUNTS FOR DELIVERIES DURING FRACTIONAL PARTS OF CALENDAR MONTHS AT THE COMMENCEMENT AND ENDING OF THE CONTRACT PERIOD SHALL BE COMPUTED PROPORTIONATELY.
THE PRICE INDICATED ON THIS SCHEDULE IS THE TOP PRICE TO BE PAID DURING THE DURATION OF THE CONTRACT, HOWEVER, THE COMMODITY CONTRACTED FOR WILL BE BILLED BY THE CONTRACTOR AT THE PRICE IN EFFECT ON THE DATE OF DELIVERY OR SHIPMENT, BUT IN NO EVENT WILL THE BILLING PRICE EXCEED THE PRICE STATED IN THIS SCHEDULE.

SRB:AR

SCHEDULE "A" OFFICE IDENTY. NO. 2437

6. Variations: Quantities listed hereon are subject to increase (or decrease) of not to exceed --------%.

7. Schedule of deliveries: DELIVER AT THE RATE OF APPROXIMATELY 1000GALS. PER MONTH, 500 GALS. EVERY 15 DAYS BETWEEN OCT. 16AND DEC. 31, 1934, AS CALLED FOR ON DELIVERY ORDERS ISSUED BY THE CAMP COMMANDER.

ANY QUANTITY NOT CALLED FOR IS AUTOMATICALLY CANCELLED.

8. Shipping directions--including packing and marking:

COMMANDING OFFICER,
CCC CO. #1432
LOCATION: NEAR CLAYTON, ALA.

ACCOUNTABLE OFFICE: Q.M., DISTRICT H. CCC., FT. BENNING, GA.

DELIVERIES NOT MEETING SPECIFICATIONS WILL BE RETURNED TO THE CONTRACTOR AT HIS EXPENSE AD CONTRACTOR WILL BE REQUIRED TO REPLACE THE QUANTITIES REJECTED WITH LIKE QUANTITIES OF SPECIFICATION QUALITY, WITHOUT COST TO THE US. GOVT.

9. Payment of bills: Render invoices in triplicate, quoting this contract number to the FINANCE OFFICER FT. MCPHERSON, GA. AND WHO SHOULD FURNISH THIS OFFICE A COPY OF EACH VOUCHER PAID HEREUNDER.

To insure prompt payment the original copy of the invoice should be certified as follows: "Certified correct, payment not received.

_____(Name of contractor)

By _____(Signer's name and title)"

10. Terms of payment: Discount will be allowed for prompt payment as follows: SEE 1ST SHEET

10 calendar days NET %; 20 calendar days NET %; 30 calendar days NET %.

11. Bond: WAIVED. name and address of guarantor(s) _____ amount, $ _____. annual Bond No. _____

12. The supplies and services to be obtained by this instrument are authorizedby, are for the purpose set forth in, and are chargeable to procurement authority FD 804 P1-0236 A8815-45, the available balance of which is sufficient to cover cost of same.

13. Serial number of Invitation For Bids RM 626-35-72 (BID #8) OPENED 9/26/34

14. Serial number of Requisition CCC 5403-119-5

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SCHEDULE OF SUPPLIES OFFICE IDENTY. NO. 2437

"B"

Must be filled in and attached to all Quartermaster Corps contracts for supplies

1. Contract number and date W 626 ECF-379, DATED OCT. 1, 1934.

2. Contracting officer, name J. D. GOODRICH, MAJOR Q.M.C.
Address 1ST AVE & 58TH ST., BROOKLYN, N.Y.

3. Contractor, name THE TEXAS COMPANY
Address 135 EAST 42ND STREET, NEW YORK, NEW YORK
Factory Name and location ____

4. F. O. B. delivery and inspection points DESTINATIONS

5. Articles or services: INSPECTION: TO BE HANDLED BY CONSIGNEES.

152

APPROX. QUANTITY	UNIT	DESCRIPTION AND SPECIFICATION	UNIT PRICE	EST. TOTAL.
		THE PRICE INDICATED ON THIS SCHEDULE IS THE TOP PRICE TO BE PAID DURING THE DURATION OF THE CONTRACT, HOWEVER, THE COMMODITY CONTRACTED FOR WILL BE BILLED BY THE CONTRACTOR AT THE PRICE IN EFFECT ON THE DATE OF DELIVERY OR SHIPMENT, BUT IN NO EVENT WILL THE BILLING PRICE EXCEED THE PRICE STATED IN THIS SCHEDULE.		
		GASOLINE, MOTOR, U.S. GOVT., SPEC. VV-G 101, DELIVERY TO BE MADE IN TANK WAGONS DIRECT TO CAMP. TO BE FURNISHED TO VARIOUS REFORESTATION CAMPS. THROUGHOUT THE STATES OF MISS. AND ALA. AS SHOWN BELOW: (FOR CIVILIAN CONSERVATION CORPS)		
2100	GALS	SHIP TO: C.O., CCC CO. #481, CAMP S-57, OXFORD, MISS. (INDIAN)	.11	$231.00
2100	GALS	SHIP TO: C.O., CCC CO. # 487. CAMP S-62, BESSEMER, ALA.(FIRE CHIEF)..	.1346	282.66
2100	GALS	SHIP TO: C.O., CCC CO. #2424. CAMP P-58, HOLLY SPRINGS, MISS.(INDIAN).	.1412	296.52
		TANK WAGON DELIVERY: CONTRACTOR'S POSTED TANK WAGON PRICE AT TIME OF DELIVERY SUBJECT TO DISCOUNTS BELOW, WITH MAXIMUM PRICES AS SHOWN IN THIS SCHEDULE.		
		DISCOUNTS:	FIRE CHIEF ABOVE 60 OCTANE	INDIAN BELOW 60 OCT
		DELIVERIES: FROM 3,000 to 10,000 GALS. PER MONTH	.01	.005
		OVER 10,000 GALS PER MONTH	.02	.01
		NO DISCOUNT MAY BE PAID OR ALLOWED AT TIME OF DELIVERY BUT SAME SHALL BE DUE AND PAYABLE WITHIN 25 DAYS FROM THE END OF THE MONTH IN WHICH DELIVERIES ARE MADE.		
		THE TERM "MONTH" AS USED IN THIS CONTRACT FOR THE PURPOSE OF DISCOUNTS MEANS A CALENDAR MONTH. DISCOUNTS FOR DELIVERIES DURING FRACTIONAL PARTS OF CALENDAR MONTHS AT THE COMMENCEMENT AND ENDING OF THE CONTRACT PERIOD SHALL BE COMPUTED PROPORTIONATELY.		
		NO DELIVERIES OF LESS THAN 50 GALLONS SHALL BE MADE.		
		PRICE TO BE PAID FOR GASOLINE DOES NOT INCLUDE STATE TAX.		
		DELIVERY OF GASOLINE, AT THE RATE OF 350 GALLONS EVERY 15 DAYS. BETWEEN OCT. 1 AND DEC. 31, 1934, AS CALLED FOR ON DELIVERY ORDERS ISSUED BY THE CAMP COMMANDER.		
		IN COMPUTING DELIVERIES TO DETERMINE TANK WAGON QUANTITY DISCOUNT EARNED, DELIVERIES OF FIRE CHIEF AND INDIAN GASOLINE ARE TO BE ADDED SEPARATELY, EACH AS IF NO DELIVERY OF THE OTHER PRODUCT HAD BEEN MADE.		
		OIL, KEROSENE, SPEC. VV-K-211, DELIVERY TO BE MADE DIRECT TO CAMP IN 5 GAL. CANS TO BE FURNISHED TO VARIOUS REFORESTATION CAMPS THROUGHOUT THE STATES OF ALABAMA, GEORGIA AND MISSISSIPPI, FOR CIVILIAN CONSERVATION CORPS IN QUANTITY AND PRICE AS FOLLOWS:-		
15	GALS	C.O., CCC CO. # 251 CAMP TVA-P-4, NITRATE PLANT, ALA.	2587	$3.88
15	"	C.O., CCC CO. #25 CAMP F-4, MOULTON, ALA. 16 MI. SOUTH	2587	3.88
15	"	C.O., CCC CO. #283 CAMP TVA-P-5, NITRATE PLANT, ALABAMA	2587	3.88
15	"	C.O., CCC CO. # 285 CAMP TVA-2- NITRATE PLANT, ALA.	2587	3.88
15	"	C.O., CCC CO. #286 CAMP TVA -6-ATHENS, GA.	2587	3.88
15	"	C.O., CCC CO. #463 CAMP F-1, MOULTON, ALA. (6 MI.SOUTH)	2587	3.88
15	"	C.O., CCC CO. #463 CAMP MISS. F-19, WATERFORD, MISS.	2525	3.79
15	"	C.O., CCC CO. #464, CAMP F-2 DANVILLE, ALA.R.F.D.#4(5 MI.S.W.)	2587	3.88
15	"	C.O., CCC CO. #464 CAMP MISS. F-17, OXFORD, MISS.	2525	3.79
15	"	C.O., CCC CO. #465 CAMP P-59, NORTHPORT, ALA. (18 MI.N.)	2587	3.88
		C.O., CCC CO. #465 CAMP ALA. SP-7, MUNFORD, ALA.	2537	3.81

15	GALS.	C.O., CCC CO. #468 CAMP SP-2, OXFORD, ALA. (7MI.S.W.)	2337	$3.51
15	"	C.O., CCC CO. #472 CAMP SP-5, FORT PAYNE,ALA.	.2587	3.88
15	"	C.O., CCC CO. #473 CAMP P-53, BATESVILLE, MISS.1½MI.S.W.)	.2525	3.79
15	"	C.O., CCC CO. #477 CAMP P-59, BLUE MOUNTAIN, MISS.	.2525	3.79
15	"	C.O., CCC CO. #480 CAMP P#56, ABBEVILE, MISS.(1 MI.EAST).	.2525	3.79
15	"	C.O., CCC CO. #480 CAMP MISS. SP-4,LOUISVILLE, MISS	.2525	3.79
15	"	C.O., CCC CO. #481 CAMP S-57, OXFORD, MISS.	.2525	3.79
15	"	C.O., CCC CO. #482 CAMP SP-2, TUPELO,MISS (10 MI.S.W.)	.2525	3.79
15	"	C.O., CCC CO. #486, CAMP F-9 POTTS CAMP, MISS (TEMPORARY) 4 MI. FROM MYRTLE, MISS.	.2525	3.79
15	"	C.O., CCC CO. #487 CAMP S-62, BESSEMER, ALA.	.2212	3.32
15	"	C.O., CCC CO. #487 CAMP ALA. SP-8, PELHAM,ALA.	.2587	3.88
15	"	C.O., CCC CO. #489, CAMP P-62 ASHLAND,MISS.,SOUTH EDGE IN CITY	.2525	3.79
15	"	C.O., CCC CO. #1403, CAMP F-3 HALEYVILLE, ALA.(14 MI. N.E.)	.2587	3.88
15	"	C.O., CCC CO. #1405, CAMP SES 1-A, DADEVILLE, ALA.(4 MI. S.E.)	.265	3.98
15	"	C.O., CCC CO. #2424 CAMP P-58, HOLLY SPRINGS, MISS.	.2525	3.79
15	"	C.O., CCC CO. #2426, CAMP TVA-P-3, TOWN CREEK, ALA. (9 MI. N.W.)	.2587	3.88
15	"	C.O., CCC CO. #444, CAMP P#57, GLENCOE, ALA. (2 MILES FROM GADSDEN, ALA.)	.2462	3.69
15	"	CO., CCC CO. #444, CAMP ALA. SES-3-, CAMP HILL, ALA.	.2587	3.88
			TOTAL	$920.32

5 GAL. CAN DELIVERY: CONTRACTOR'S POSTED TANK WAGON PRICE AT TIME OF DELIVERY,WITH MAXIMUM PRICE AS SHOWN IN THIS SCHEDULE. PRICE INCLUDES COST OF 5 GALLON CONTAINER.
DELIVERY OF KEROSENE: AT THE RATE OF 5 GALLONS (ONE DELIVERY) PER MONTH BETWEEN OCT. 1 AND DEC. 31, 1934 AS CALLED FOR ON DELIVERY ORDER ISSUED BY THE CONSIGNEE.

6. Variations: Quantities listed hereon are subject to increase (or decrease) of not to exceed ------ %.

7. Schedule of deliveries: AS SHOWN IN [redacted] SHEETS 2 AND 3

ANY QUANTITY NOT CALLED FOR IS AUTOMATICALLY CANCELLED.

8. Shipping directions--including packing and marking:

AS INDICATED IN SHEETS 1, 2, AND 3.

ACCOUNTABLE OFFICE: C.M., DISTRICT D. CCC., FORT MC CLELLAN, ALA.

DELIVERIES NOT MEETING SPECIFICATIONS WILL BE RETURNED TO THE CONTRACTOR AT HIS EXPENSE AND CONTRACTOR WILL BE REQUIRED TO REPLACE THE QUANTITIES REJECTED WITH LIKE QUANTITIES OF SPECIFICATION QUALITY, WITHOUT COST TO THE US. GOVT.

9. Payment of bills: Render invoices in triplicate, quoting this contract number, to the FINANCE OFFICER, FT. MC PHERSON, GA. AND WHO SHOULD FURNISH THIS OFFICE A COPY OF EACH VOUCHER PAID HEREUNDER.

To insure prompt payment the original copy of the invoice should be certified as follows: "Certified correct, payment not received.

_____(Name of contractor)

By_____(Signer's name & title)"

154

"B"

10. Terms of payment: Discount will be allowed for prompt payment as follows: SEE 1ST SHEET

10 calendar days Net%; 20 calendar days NET %; 30 calendar days NET%.

11. Bond: WAIVED. Name and address of guarantor(s) ——— Amount $ ——— Annual Bond No ———

12. The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to procurement authority FD 804 P1-0236 A8815-45 the available balance of which is sufficient to cover cost of same.

13. Serial number of Invitation for Bids RM 626-35-72(BID #8) OPENED 9/26/34

14. Serial number of Requisition CCC 5403-131-45

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War Department
Q.M.C Form 309
Authorized Nov. 1c, 1927

OFFICE IDENTY. 2437

SCHEDULE OF SUPPLIES "F"

Must be filled in and attached to all Quartermaster Corps contracts for supplies.

1. Contract number and date W 626 ECF-379, DATED OCT. 1, 1934.

2. Contracting officer, name J. D. GOODRICH, MAJOR Q.M.C.
Address 1ST AVE. & 58TH ST., BROOKLYN, N.Y.

3. Contractor, name THE TEXAS COMPANY
Address 135 EAST 42ND STREET, NEW YORK, NEW YORK
Factory name and location

4. F. O.B. delivery and inspection points AS INDICATED BELOW

5. Articles or services: INSPECTION: TO BE HANDLED BY CONSIGNEES

APPROX. QUANTITY	UNIT	DESCRIPTION AND SPECIFICATION	UNIT PRICE	EST. TOTAL

THE PRICE INDICATED ON THIS SCHEDULE IS THE TOP PRICE TO BE PAID DURING THE DURATION OF THE CONTRACT, HOWEVER, THE COMMODITY CONTRACTED FOR WILL BE BILLED BY THE CONTRACTOR AT THE PRICE IN EFFECT ON THE DATE OF DELIVERY OR SHIPMENT BUT IN NO EVENT WILL THE BILLING PRICE EXCEED THE PRICE STATED IN THIS SCHEDULE. DELIVERIES NOT MEETING SPECIFICATIONS WILL BE RETURNED TO THE CONTRACTOR AT HIS EXPENSE AND CONTRACTOR WILL BE REQUIRED TO REPLACE THE QUANTITIES REJECTED WITH LIKE QUANTITIES OF SPECIFICATION QUALITY, WITHOUT COST TO THE U.S. GOVT.

GASOLINE, MOTOR, US GOVERNMENT, SPEC. VV-G-101. TO BE FURNISHED TO VARIOUS REFORESTATION CAMPS THROUGHOUT THE STATES OF FLORIDA AND MISSISSIPPI, AND ALABAMA, FOR CIVILIAN CONSERVATION CORPS, IN QUANTITY, PRICE AND DELIVERY AS INDICATED IN SHEETS 2 AND 3.

PRICE TO BE PAID FOR GASOLINE DOES NOT INCLUDE STATE TAX.

TANK WAGON DELIVERY: CONTRACTOR'S POSTED TANK WAGON PRICE AT TIME OF DELIVERY SUBJECT TO DISCOUNTS BELOW, WITH MAXIMUM PRICES AS SHOWN IN THIS SCHEDULE.

DISCOUNTS:		"INDIAN" BELOW 60 OCTANE	"FIRE CHIEF" ABOVE 60 OCTANE
DELIVERIES:	FROM 3,000 to 10,000 GALS. PER MO.	.005	.01
	OVER 10,000 GALS. PER MONTH	.01	.02

155

172

NO DISCOUNT MAY BE PAID OR ALLOWED AT TIME OF DELIVERY BUT SAME SHALL BE DUE AND PAYABLE WITHIN 25 DAYS FROM THE END OF THE MONTH IN WHICH DELIVERIES ARE MADE.
THE TERM "MONTH" AS USED IN THIS CONTRACT FOR THE PURPOSE OF DISCOUNTS MEANS A CALENDAR MONTH. DISCOUNTS FOR DELIVERIES DURING FRACTIONAL PARTS OF CALENDAR MONTHS AT THE COMMENCEMENT AND ENDING OF THE CONTRACT PERIOD SHALL BE COMPUTED PROPORTIONATELY.
TANK WAGON DELIVERY DIRECT TO CAMP

2000	GALS.	C.O., CCC CAMP ALA SP-1 (FIRE CHIEF) LOCATED NEAR HACODA, ALA.	.1783	$356.60
2000	"	C.O., CCC CAMP ALA SP-3 (FIRECHIEF) LOCATED NEAR URIAH, ALA.	.1783	356.60
2000	"	C.O., CCC CAMP ALA SP-6 (FIRE CHIEF) LOCATED NEAR FOLEY, ALA.	.1783	356.60
2000	"	C.O., CCC CAMP ALA P*54 (FIRE CHIEF) LOCATED NEAR BREWTON, ALA.	.1721	344.20
2000	"	C.O., CCC CAMP ALA P-55 (FIRE CHIEF) LOCATED NEAR VREDENBURGH, ALA.	.1783	356.60
2000	"	C.O., CCC CAMP ALA P-60 (FIRE CHIEF) LOCATED NEAR CHATOM, ALA.	.1783	356.60
2000	"	C.O., CCC CAMP ALA P-61 (FIRE CHIEF) LOCATED NEAR BAY MINETTE, ALA.	.1533	306.60
2000	"	C.O., CCC CAMP ALA P-63 (FIRE CHIEF) LOCATED NEAR JACKSON, ALA.	.1783	356.60
2000	"	C.O., CAMP FLA F-3- CCC (FIRE CHIEF) LOCATED NEAR NICEVILLE, FLA.	.1636	327.20
2000	"	C.O., CCC CAMP FLA P-70 (FIRE CHIEF) LOCATED NEAR SCOTT'S FERRY, FLA.	.1636	327.20
6000	"	Q.M., DISTRICT "B", HDQRS. (INDIAN) AT FORT BARRANCAS, FLA.	.10883	652.98
2000	"	C.O., CCC CAMP MISS F-4 (FIRE CHIEF) LOCATED NEAR OVETT, MISS.	.16	320.00
2000	"	C.O., CCC CAMP MISS F-12(INDIAN) LOCATED NEAR BILOXI, MISS.	.1225	245.00

NO DELIVERIES OF LESS THAN 50 GALLONS SHALL BE MADE.

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SERVICE STATION DELIVERY DIRECT TO CONSIGNEE'S MOTOR EQUIPMENT AT CONTRACTOR'S SERVICE STATIONS FOR CAMPS THROUGHOUT THE STATE OF ALABAMA.

SERVICE STATION DELIVERY: CONTRACTOR'S POSTED SERVICE STATION PRICE AT TIME AND PLACE OF DELIVERY WITH MAXIMUM PRICES AS SHOWN IN THIS SCHEDULE. "FIRE CHIEF" GASOLINE SHALL BE FURNISHED.

9000	GALS.	FOR CAMPS LISTED ON SHEET 3.	.1975	1777.50
			TOTAL	$6440.25

C.O., CCC CAMP ALA SP-1
LOCATED NEAR HACODA, ALA.

C.O., CCC CAMP ALA SP-3
LOCATED NEAR URIAH, ALA

C.O., CCC CAMP ALA SP-6
LOCATED NEAR FOLEY, ALA.
C.O., CCC CAMP ALA S-52.
LOCATED NEAR CHUNCHULA, ALA.

C.O., CCC CAMP ALA S-53
LOCATED NEAR FLORALA, FLA.

C.O., CCC CAMP ALA P-54
LOCATED NEAR BREWTON, ALA.

C.O., CCC CAMP ALA P-55
LOCATED NEAR VREDENBURGH, ALA.

C.O., CCC CAMP ALA P-61
LOCATED NEAR BAY MINETTE, ALA.

C.O., CCC CAMP ALA P-63
LOCATED NEAR JACKSON, ALA.

NOTE: IN COMPUTING DELIVERIES TO DETERMINE TANK WAGON QUANTITY DISCOUNT EARNED, DELIVERIES OF FIRE CHIEF AND INDIAN GASOLINE ARE TO BE ADDED SEPARATELY, EACH AS IF NO DELIVERY OF THE OTHER PRODUCT HAD BEEN MADE.

6. Variations: Quantities listed hereon are subject to increase (or decrease) ~~not~~ not to exceed ------%.

BETWEEN NOV. 1 AND DEC. 31, 1934, AS CALLED FOR

7. Schedule of deliveries: ON DELIVERY ORDERS ISSUED BY THE CAMP COMMANDER. ANY QUANTITY NOT CALLED FOR IS AUTOMATCALLY CANCELLED.

7a. THIS CONTRACT IS FOR GENERAL UTILIZATION AT THE STATION NAMED HEREIN: ALL CALLS ON CONTRACTOR OR ORDERS FOR DELIVERY OF SUPPLIES HEREUNDER, ISSUED BY THE CONSIGNEE WILL CONTAIN THE CERTIFICATE AS TO AVAILABILITY OF FUNDS QUOTING THE PROCUREMENT AUTHORITY NUMBER TO BE USED IN MAKING PAYMENTS. PROCURELENTS AUTHORITIES APPLICABLE:

FD 804 P1-0236 A8815-45
FD 804 P1-0205 A8815-45
FD 804 P1-0230 A8815-45
FD 804 P1-0282 A8815-45

8. Shipping directions--including packing and marking:

AS INDICATED IN SHEETS 2 AND 3.

ACCOUNTABLE OFFICE: Q.M., DISTRICT "8" CCC FT. BARRANCAS, FLA.

9. Payment of bills: Render invoices in triplicate, quoting this contract number, to the FINANCE OFFICER: FT. MC PHERSON, GA. AND WHO SHOULD FURNISH THIS OFFICE COPY OF EACH VOUCHER PAID HEREUNDER.

To insure prompt payment the original copy of the invoice should be certified as follows: "Certified correct, payment not received.

_____(name of contractor)

By_____(Signer's name and title)"

10. Terms of payment: Discount will be allowed for prompt payment as follows: SEE 1ST SHEET
10 calendar days NET%; 20 calendar days, NET%; 30 calendar days, NET%.

11. Bond: WAIVED. Name and address of guarantor(s) _____ Amount, $_____ Annual Bond No _____.

12. The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to procurement authority: SEE PAR. 7A ABOVE, THE AVAILABLE BALANCE OF which is sufficient to cover cost of same.

13. Serial number of Invitation for Bids: RM 626-35-72 (Bid #8) OPENED 9/26/34

14. Serial number of Requisition: CCC 137-1-5.

(The contract also contains provisions for the sale and delivery by the Texas Company to the United States of gasoline and other petroleum products in states other than Alabama, which provisions are, by agreement of the parties, eliminated from the record.)

("Instructions to Bidders" and the other concluding provisions of this contract are substantially the same as "Instructions to Bidders" and the concluding portions of the contract set out and copied at length in Exhibit 3, which sheets and provisions of said contract, Exhibit 4, are, by agreement of the parties, eliminated from the record, except that said contract is dated and executed in the manner hereinafter set out.)

[fol. 158] In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

The United States of America, by (Signed) J. D. Goodrich (Official title:) Major, Q. M. Corps. The Texas Company, Contractor, by (Signed) Frank J. Shipman, Manager. (Business address:) 135 East 42nd Street, New York, N. Y.

Two witnesses: T. M. Thomas. R. H. Stoyle.

I, W. G. Elicker, certify that I am the Assistant Secretary of the corporation named as contractor herein; that Frank J. Shipman who signed this contract on behalf of the contractor, was then Manager of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(Signed) W. G. Elicker, Asst. Secretary. (Corporate Seal.)

[fol. 159] EXHIBIT "5"

United States Department of the Interior,

Office of the Secretary,

Washington

Feb. 25, 1935.

The Texas Company, 135 East 42 Street, New York City, N. Y.

GENTLEMEN:

With reference to your bid of February 11 which was opened at this office on February 13, covering the proposed purchase of gasoline and lubricating oil for Interior Department activities, please be advised that you have been awarded a contract covering all items as listed in the advertisement of February 1.

This contract, the number of which is I-S-1615, calls for the delivery from your service stations located in all 48 states and the District of Columbia, of Texaco Fire Chief

gasoline in quantities as specified at the posted service station price in effect at time and place of delivery, subject to the maximum prices for each State as quoted in your proposal. Texaco Ethyl gasoline is to be furnished in the 20 States as listed in the advertisement referred to above at the posted service station price for this grade of gasoline in effect at time and place of delivery, subject to the maximum prices as quoted in your bid.

Texaco crack-proof motor oil is to be furnished at the posted retail service station price in effect at time and place of delivery with a guarantee that the maximum price chargeable will not exceed $.3125 per quart. The prices for all products quoted herein include only the 1¢ Federal Tax, and do not include any State, local or other non-applicable Taxes. This contract will cover the period from March 1, to June 30, 1935.

The Geological Survey, the Federal Emergency Administration of Public Works, and the Division of Investigations have signified their intentions of participating in this contract, and have been notified of the award under even date. Each Bureau will contact your office directly, and it is hoped that satisfactory arrangements will be made for delivering the specified products to all employees who are properly identified, and for rendering monthly invoices to each unit.

In reply, please refer to File: JRM-1935.

Very truly yours, W. B. Fry, Purchasing Officer.

Purchasing Office.
Procurement.
J. R. M.

Memorandum for Geological Survey

Feb. 25, 1935.

[fol. 160] This will refer to your Requisition No. 132 requesting this Office to execute contracts for the service station delivery of gasoline and oil for use by your field parties during the current Fiscal Year. At present purchases are being made under five contracts, all of which expire on February 28.

A new contract has been made with the Texas Company of New York City covering the delivery of gasoline and

lubricating oil in all 48 States and the District of Columbia for the balance of the current Fiscal Year, beginning on March 1.

The contractor will furnish Texaco Fire Chief gasoline in all States at the posted service station price in effect at time and place of delivery, subject to the maximum prices quoted on the attached sheet. These maximum prices include 1¢ Federal Tax, but do not include any local or State taxes.

In the States where high test gasoline was requested, Texaco Ethyl gasoline will be furnished at the posted service station price in effect at time and place of delivery, subject to the maximum price quoted on the attached sheet. These maximum prices for the high test gasoline include only the 1¢ Federal Tax.

The contractor will furnish Texaco crack-proof motor oil in grades SAE 20, 30, 40 and 50, at the posted service station price in effect at time and place of delivery, with a guarantee that the maximum price chargeable during the contract period will not exceed $.3125 per quart including the Federal Tax. For your information the prevailing service station price for this oil at all points in the country is $.26 per quart including the Federal Tax.

The contractor has been notified of this award under even date, copy of which letter you will receive. The products covered by this contract will be furnished your field parties upon their presentation of the proper identification card, and invoices will be rendered monthly by the Company.

You will be furnished with 8 copies of the contract at an early date, number of which is I-S-1615.

W. B. Fry, Purchasing Officer.

Enclosure 540888
2-mb-21 Copy to: Texas Co., 135 E. 42nd St., N. Y. City.

Purchasing Office.
Procurement.
J. R. M.

Memorandum for Division of Investigations

Feb. 25, 1935.

With reference to your memorandum of February 11 requesting that employees of your Oil Enforcement Unit

be permitted to participate in the gasoline and oil contracts to be executed by this Office for the Geological Survey, please be advised that a contract has been made with the Texas Company, New York City, covering the service station delivery of these products in all 48 States, and in the District of Columbia. Purchases under same may be made during the period from March 1, to June 30, 1935.

The contract specifies the delivery in all 48 States and in the District of Columbia, of Texaco Fire Chief gasoline at the posted service station price in effect at time and place of delivery, subject to the maximum prices for each [fol. 161] State as listed on the attached sheet. Texaco crack-proof motor oil, in all grades, will be furnished at the prevailing service station price in effect at time of delivery with a guaranteed maximum price of not to exceed $.3125 per quart. All prices quoted herein include only 1¢ Federal Tax, and do not include any State, local or other non-applicable Taxes.

Deliveries will be made from all Texaco stations to any of your employees who are properly identified by Standard Form 44, and invoices will be rendered monthly by the contractor.

It will be necessary for you to contact the Texas Company, New York City, direct in order to complete final arrangements.

W. B. Fry, Purchasing Officer.

Enclosure 540891.
2-mb-21.
Copy to: Texas Company, 135 East 42 St., N. Y. C.

Purchasing Office.
Procurement.
J. R. M.

Memorandum for Federal Emergency Administration of Public Works

Feb. 25, 1935.

With further reference to your memorandum of January 17, requesting that your field officers be included in the gasoline and oil contracts to be executed for the Geological Survey, please be advised that a contract has been made with the Texas Company of New York City, covering

the delivery of these products in all 48 States and the District of Columbia. Purchases under this contract may be made during the period from March 1 to June 30, 1935.

The contract specifies the delivery in all 48 States and in the District of Columbia, of Texaco Fire Chief gasoline at the posted service station price in effect at time and place of delivery, subject to the maximum prices for each State as listed on the attached sheet. Texaco crack-proof motor oil, in all grades, will be furnished at the prevailing service station price in effect at time of delivery with a guaranteed maximum price of not to exceed $.3125 per quart. All prices quoted herein include only 1¢ Federal Tax, and do not include any State, local or other non-applicable Taxes.

Deliveries will be made from all Texaco stations to any of your employees who are properly identified by Standard Form 44, and invoices will be rendered monthly by the contractor.

It will be necessary for you to contact the Texas Company, New York City direct in order to complete final arrangements.

W. B. Fry, Purchasing Officer.

Enclosure 540890.
2-mb-21.
Copy to: Texas Company, 135 East 42nd St. N. Y. C.

Standard Form No.33
Approved by the President June 16, 1927.

STANDARD GOVERNMENT SHORT FORM CONTRACT

Contract No._____

DEPARTMENT OF THE INTERIOR (SUPPLIES) Purchasing Office

Washington, D. C. (Department of Establishment)

February 1, 1935. (Office)

(Address)

(Date)

One copy only

INVITATION

Sealed bids, in Room 144 10:00 p. February 13, 1935, subject to the conditions on the reverse hereof, will be received at this office until _____ o'clock _____ m., _____ and then publicly opened, for furnishing the following supplies, and/or services, delivery, GASOLINE AND LUBRICATING OIL for INTERIOR DEPARTMENT ACTIVITIES

W. A. Fry (Name) Purchasing Officer (Title)

ITEM NO.	ARTICLES OR SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
	The attached conditions on Standard Form No. 36 form a part of this advertisement. The Certificate of Compliance on the reverse side thereof must be signed and dated. Sign and date your bid on the reverse side of this form. The attention of bidders is invited to the following Schedule of gasoline and oil requirements of Field Parties of the Geological Survey and of the field forces of the Public Works Administration. All quantities listed herein are estimated, and the Government reserves the right to order only such quantities as are actually needed, and to purchase any additional quantities that might be required. Nothing herein is intended to conflict with the provisions of any existing Code for the Petroleum Industry, and if such a conflict becomes apparent the provisions of this advertisement will be waived to that extent. THE GOVERNMENT RESERVES THE RIGHT TO MAKE THE AWARD ON BOTH GRADES OF GASOLINE AND THE LUBRICATING OIL ON AN ALL OR NONE BASIS FOR DELIVERY WITHIN ANY INDIVIDUAL STATE. ALL PRICES QUOTED HEREIN SHALL INCLUDE ANY FEDERAL TAX BUT ARE NOT TO INCLUDE ANY STATE OR MUNICIPAL TAXES. ANY CONTRACTS RESULTING FROM THIS ADVERTISEMENT WILL COVER THE PERIOD OF FROM MARCH 1st TO JUNE 30th, 1935.				

(Continued on _____ sheets of Standard Form 36, attached hereto, each of which should bear the name of the bidder.)

CONDITIONS

1. The Government reserves the right to reject any and all bids, to waive any informality in bids and, unless otherwise specified by the bidder, to accept any item in the bid. In case of error in the extension of prices in the bid, the unit prices will govern.
2. Time, in connection with discount offered, will be computed from date of delivery of the supplies to carrier when final inspection and acceptance are

162

180

at point of origin, or from date of delivery at destination or port of embarkation, when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter date is later than the date of delivery.

3. In case of default of the contractor, the Government may procure the articles or services from other sources and hold the contractor responsible for any excess cost occasioned thereby.

4. No member of or delegate to Congress, or resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit.

BID

New.York,.February.11,.1935
(Date)

In compliance with the above invitation for bids, and subject to all the conditions thereof, the undersigned offers and agrees, if this bid be accepted within 20 days from the date of the opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, and, unless otherwise specified, within 1 days after receipt of order, delivery AS SPECIFIED IN THIS PROPOSAL.

Discounts will be allowed for prompt payment as follows: 10 calendar days, Net per cent; 20 calendar days, Net per cent; 30 calendar days, Net per cent.

THE TEXAS COMPANY (Bidder) — 135 East 42nd St., New York, N. Y. (Address)

By _____ (Member of firm or person authorized to sign bids for corp.) — Title MANAGER

ACCEPTANCE

_____ (Date)

Accepted as to items numbered _____

_____ (Name), _____ (Title)

INSTRUCTIONS TO BIDDERS

1. Samples of items, when required, must be furnished, free of expense, prior to the opening of bids, and, if not destroyed, will, upon request, be returned at the bidder's expense.
2. Prices should be stated in units of quantity specified with packing included.
3. Time of proposed delivery must be stated in definite terms. If time varies for different items the bidder shall so state.
4. If the item bid upon has a trade name or brand, such trade name or brand must be stated in the bid.
5. To insure prompt payment, bills should be certified as follows: "I certify that the above bill is correct and just, and that payment therefor has not been received."

Note.--This form is adaptable generally for use whether or not a formal contract is required.

ITEM NO.	ARTICLES OR SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT Dollars	AMOUNT Cents

The following certificate form shall be signed and submitted by all bidders with all bids involving expenditure of Government funds (whether Federal or non-Federal), in accordance with Executive Order No. 6646, dated March 14, 1934. Only bids containing or accompanied by such certificate shall be considered or accepted. Bidders shall also require subcontractors (including suppliers) to sign similar certificates before making awards to or purchases from such subcontractors. Such certificate may be accepted as evidence that the contractor is complying with the applicable approved code or codes offair competition adopted under title I of the National Industrial Recovery Act for the trade or industry or subdivision thereof involved, or, if there be no such approved code of fair competition, with the President's Reemployment Agreement.

CERTIFICATE OF COMPLIANCE

It is hereby certified that the undersigned is complying with and will continue to comply with each approved code of fair competition to which he is subject, and/or if engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry that he has become a party to and is complying with and will continue to comply with an agreement with the President under section 4 (a) of the National Industrial Recovery Act (President's Reemployment Agreement) and that all other conditions and requirements of Executive Order No. 6646, dated March 14, 1934, are being and will be complied with.

Provided , that where supplies are purchased that are not mined, produeced, or manufactured in the United States (see Sec. 2, title III, of the act approved March 3, 1933, Public No. 428, 72d Cong.), the special or general code of fair practice shall apply to that portion of the contract executed within the United States.

February 11, 1935 (Date)

THE TEXAS COMPANY (Individual or firm name)

By _____ MANAGER

STANDARD GOVERNMENT FORM OF CONTINUATION SCHEDULE FOR STANDARD FORM 31 or 33. (Supplies)

ITEM NO.	ARTICLES OR SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT Dollars	AMOUNT Cents

1. DOMESTIC MATERIALS.—It is hereby certified that in the event award is made to the undersigned, the unmanufactured articles or materials furnished the United States will have been mined or produced in the United States; and the manufactured articles, materials, and supplies, will have been manufactured in the United States from articles, materials mined, produced, or manufactured, as the case may be, in the United States, except as noted below or otherwise indicated in this bid.

2. FEDERAL TAX.—If any Federal sales or other Federal Tax is imposed or changed after the date set for the opening of this bid and is made applicable to and paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly.

3. CERTIFICATE OF COMPLIANCE.—No bid will be considered which is not accompanied by a certificate of compliance with Executive

Order No. 6646. Sign and date the certificate on the reverse side of this form, in the spaces proved therefor.

4. CONTACTUAL CLAUSE.--In the event this bid is accepted and thereby becomes a contract, the following paragraph will be in full force and effect:

"The contractor shall comply with each approved code of fair competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under section 4 (a) of the National Industrial Recovery Act (President's Reemployment Agreement), and the United States shall have the right to cancel this contract for failure to comply with this provision and make open-market purchases or have the work called for by this contract otherwise performed at the expense of the contractor, and the contractor shall not accept or purchase for the performance of this contract or purchase order or enter into any subcontracts for any articles, materials, or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid."

_____
(Bidder)

Page 1. P.W. 26969

STANDARD GOVERNMENT FORM OF CONTINUATION SCHEDULE FOR STANDARD FORM 31 OR 33

(SUPPLIES)

ITEM NO.	ARTICLES OR SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT Dollars	Cents
	REQUIREMENTS BY STATES FOR GASOLINE (STANDARD GRADE)			MAXIMUM PRICE		
1.	Alabama	700	gals.	$.185		
	(Requirements as to other states omitted by agreement)					
	THE TEXAS COMPANY (Bidder)					
	THE ABOVE QUANTITIES SHALL MEET THE REQUIREMENTS OF FEDERAL SPECIFICATION VV-G-101. It is understood however that no proposals offering delivery of other than what is commonly known as second grade or Standard grade gasoline will be considered. The price shall be Seller's posted retail service station price for TEXACO FIRE CHIEF GASOLINE in effect at time and place of delivery, including the Federal Tax, but exclusive of any State, County of Municipal Tax. In no event, however, will the price charged during the contract period, exceed the maximum prices quoted herein, including the Federal Tax. THE TEXAS COMPANY (Bidder)					

165

P.W. 26969

STANDARD GOVERNMENT FORM OF CONTINUATION SCHEDULE FOR STANDARD FORM 31 OR 33

(SUPPLIES)

ITEM NO.	ARTICLES OR SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT Dollars	AMOUNT Cents
	REQUIREMENTS BY STATES FOR GASOLINE (HIGH TEST)					
a-1	Alabama	280	gals.	$.205		
	(Requirements as to other states omitted by agreement)					
	THE ABOVE QUANITITES SHALL MEET THE REQUIREMENTS OF FEDERAL SPECIFICATION NO. VVM571.					
	It is understood that the gasoline purchased under this specification will contain Tetraethyl Lead and shall be what is commonly known as high test gasoline.					
	The price shall be Seller's posted retail service station price for TEXACO ETHYL GASOLINE in effect at time and place of delivery, including the Federal Tax, but exclusive of any State, County or Municipal Tax. In no event, however, will the price charged during the contract period, exceed the maximum prices quoted above, including the Federal Tax.					
	THE TEXAS COMPANY. (Bidder)					

166

[fol. 166½] United States Department of the Interior

Office of the Secretary

For the Information of Bidders

The Administrator for Industrial Recovery issued an order June 12, 1934, which is quoted below for your information and guidance.

"Order

"'Granting Limited Exemption from Provisions of Codes of Fair Competition in Connection with Quotations Made to Governmental Agencies

"'Administrative Order No. X—48

"'Whereas, certain provisions of Codes of Fair Competition, approved under Title I of the National Industrial Recovery Act, are in conflict with statutory provisions or well-established procedure relating to contracts awarded by the United States, the District of Columbia, and the various States or political subdivisions thereof (all of which are hereinafter described as Governmental agencies); and

"'It appearing to me that the exemption hereinafter granted is in furtherance of the public interest and will tend to effectuate the policy of said title of said act;

"'Pursuant to the authority vested in me under the said title of said act by Executive Orders of the President, including Executive Order No. 6543—A, dated December 30, 1933, and otherwise, it is hereby ordered that members of industry subject to codes of fair competition who bid or may bid on contracts to be awarded by Governmental agencies be and they are hereby exempted from compliance with any provisions of such codes governing the making of quotations to Governmental agencies which prohibit any of the following practices, and such members, notwithstanding such prohibitions contained in such codes may—

"'(a) Quote prices and terms of sale to Governmental agencies as favorable as those permitted to be quoted to any commercial buyer for like quantities;

"'(b) Quote definite prices or terms of sale, not subject [fol. 167] to adjustment resulting in increased costs during

the life of the contract, for definite quantities and for definite periods not to exceed three months (unless a longer period is now permitted by any such code);

"'(c) Quote definite prices and terms of sale, not subject to adjustment resulting in increased costs during the life of the contract, for indefinite quantities, and for definite periods not to exceed 6 months (unless a longer period is now permitted by any such code);

"'(d) Quote prices and terms to apply on contracts to become effective not more than 60 days from the date of the opening of bids;

"'(e) Quote prices f.o.b. point of origin and/or f.o.b. destination.

"'Provided, however, That the exemption hereby granted shall be limited to and operative only in connection with quotations made by such members to Governmental agencies; that nothing in this order contained shall operate to permit deviation from or abandonment of open price and cost protection provisions now or hereafter contained in any such code; and that nothing in this order contained shall relieve any such member at any time from duty of complying with all other provisions of such codes.'"

United States Department of the Interior

Special Contract Provisions

(To be used in connection with the Government Standard Contract Forms in the procurement of supplies from Public Works Administration Fund.)

Articles

Domestic Materials.—In the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, or supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States, except as provided in the specifications.

NRA Compliance.—The contractor shall comply with each approved code of fair competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under section 4(a) of the National Industrial Recovery Act (President's Reemployment Agreement), and the United States shall have the right to cancel this cont-act for failure to comply with this provision and make open-market purchases or have the work called for by this contract otherwise performed at the expense of the contractor, and the contractor shall not accept or purchase for the performance of this contract or purchase order or enter into any subcontracts for any articles, materials, or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials, or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid.

Convict Labor.—No materials manufactured or produced by convict labor shall be used or furnished in the performance of this contract.

Termination for Breach.—In the event any of the provisions of this contract are violated by the contractor or any subcontractor, the contracting officer may terminate the contract by written notice to the contractor, and purchase similar supplies in the open market or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.

[fol. 168] Subcontractors.—The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this contract to insure the fulfillment of all its provisions affecting such subcontractors.

[fol. 169] EXHIBIT 6

Invitation No. 1.

Contract No. Tss-167.

U. S. Standard Form 33 (Revised).

Approved by the Secretary of the Treasury Sept. 17, 1934.

Invitation, Bid, and Acceptance

(Short Form Contract)

Treasury Department

Treasury Building, Washington, D. C.

Secret Service Division

June 24, 1935.

Invitation

Sealed bids, in quadruplicate subject to the conditions on the reverse hereof, will be received at this office until — o'clock, June 28, 1935, and then publicly opened, for furnishing the following supplies, and/or services, for delivery in continental United States.

W. H. Moran, Chief, Secret Service.

Item No.	Articles or Services	Quantity	Unit	Unit Price	Amount Dollars	Amount Cents
1	Gasoline, lubricating oils, and other lubricants and radiator Anti-Freeze for use in government-owned automobiles of the Secret Service Division, by service station delivery throughout the continental United States, where service stations are located. All conditions of this advertisement will be incorporated as a part of any contract resulting therefrom, which shall cover the period beginning with July 1, 1935, to and including June 30, 1936. (a) Gasoline @ — per gallon.—Please see rider. All gasoline furnished under requests for "Regular" gasoline must be first grade, non-premium, to comply in					

all respects with Federal Specifications VV-G-101, and having a minimum octane rating of 65. Bids on so-called "Third Structure" gasoline will not be considered.

Where "High Test" gasoline is specified, the product bid on must be one known commercially as first grade premium gasoline, containing Tetraethyl Lead and comply in all respects with Federal Specifications VV-M-571.

(b) Motor oil @ — per gallon.—Please see rider. Bids on the lubricating oil must be on a first grade non-premium oil, and must include all grades from SAE 20, through SAE 50.

The right is reserved to order any oil within the specified limits.

Bidders must state the trade name of all gasolines and oil offered.

These requirements are for service station delivery and bids on any other type of delivery can receive no consideration. Since these products are for use by Field Employees of this Division, the ability of each bidder to make service station delivery will be taken into consideration when award is made.

Each bidder is requested to submit with his bid a list by States of Towns in which service stations are maintained and from which delivery may be made.

Bids must be submitted on complete items, and failure to do so will be cause for the rejection of any bid.

Prices quoted shall be exclusive of state or municipal taxes. This applies not only to a tax imposed directly on the consumer but also where the tax is imposed as a license fee on the dealer and in fact to any arrangement whereby the revenue of a state is increased by the purchase of gasoline and oil by the Federal Government.

All bids on gasoline or other items listed herein will therefore be at a price exclusive of any state and/or municipal tax and with no provisions for any addition thereto on account of any state or municipal tax. The [fol. 170] bidder certifies that the prices quoted herein are exclusive of any state and/or municipal tax and

that no state and/or municipal tax will be added to any of the prices quoted herein.

It is understood that the prices quoted in this bid include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of this bid and made applicable directly upon the production, manufacture, or sale of the supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and any amount due the contractor as a result of such a change will be charged to the Government and entered on vouchers (or invoices) as separate items.

Bids are requested on the basis that if subsequent legislation shall require observance of minimum wages and/or maximum hours of employment and/or limitation as to age of employees, in the performance of Government contracts, any contract entered into shall be subject to modification to accord with such statutory requirements to the extent authorized or required by law.

It is understood and agreed that the contractor will submit to the above named Division of the Government monthly statements in triplicate, the original to be properly certified to, as required herein, and supported by service station invoices covering each sale, each of which shall bear the signature of the individual purchaser of the U. S. Secret Service Division, and that the above named Division in turn will promptly place such statements, if correct and just, in channels for payment.

No bid will be considered which provides that the Government shall guarantee to take any definite quantity.

Bid

(Date:) New York, July 1, 1935.

In compliance with the above invitation for bids, and subject to all the conditions thereof, the undersigned offers, and agrees, if this bid be accepted within 25 days from the date of the opening, to furnish any or all of the items upon

which prices are quoted, at the price set opposite each item, f.o.b., as specified and, unless otherwise specified within 1 days after receipts of order.

Discounts will be allowed for payment as follows: 10 calendar days, Net per cent; 20 calendar days, Net per cent; 30 calendar days, Net per cent.

Bidder: The Texas Company, Address: 135 East 42nd St., New York, N. Y., by (Signature of person authorized to sign this bid:) Frank J. Shipman, Title: Manager.

Acceptance by the Government

(Date:) July 2, 1935.

Accepted as to items numbered 1—(a & b) including deliveries of anti-freeze.

Name: W. H. Moran, Title: Chief, Secret Service.

Conditions

1. The Government reserves the right to reject any or [fol. 171] all bids, to waive any informality in bids and, unless otherwise specified by the bidder, to accept any item in the bid. In case of error in the extension of prices in the bid, the unit prices will govern.

2. Time, in connection with discount offered, will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter date is later than the date of delivery.

3. In case of default of the contractor, the Government may procure the articles or services from other sources and hold the contractor responsible for any excess cost occasioned thereby: Provided, That if public necessity requires the use of materials or supplies not conforming to the specifications they may be accepted and payment therefor shall be made at a proper reduction in price.

4. No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of

this contract or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit.

5. Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of this bid, and made applicable directly upon the production, manufacture, or sale of the supplies covered by this bid, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

6. Unless otherwise specified by the bidder, it is under- [fol. 172] stood and agreed that only such unmaufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured as the case may be, in the United States shall be delivered pursuant to a contract awarded as a result of this bid.

Instructions to Bidders

1. Samples of items, when required, must be furnished, free of expense, prior to the opening of bids, and, if not destroyed, will, upon request, be returned at the bidder's expense.

2. Prices should be stated in units of quantity specified, with packing included.

3. Time of proposed delivery must be stated in definite terms. If time varies for different items the bidder shall so state.

4. Envelop-s containing bids must be sealed and marked on the upper lefthand corner with the name and address of the bidder and the date and hour of opening, and addressed as instructed.

5. To insure prompt payment, the original bill only should be certified as follows: "I certify that the above

bill is correct and just, and that payment therefor has not been received."

6. For further instructions read U. S. Standard Form 22 (Instructions to Bidders).

Instructions to Contracting Officers

1. If shipment is made by Government bill of lading, observe consolidated classification requirements so as to secure the lowest rate applicable.

2. Although this form meets the requirements of a formal contract (R. S. 3744), if the execution of a formal contract with bond is contemplated U. S. Standard Forms 31 and 32 should be used.

3. If there is not sufficient space on the schedule to list all of the items, insert at the bottom of the schedule "Continued on — sheets of U. S. Standard Form 36" and use that form also.

4. If it is definitely known that final acceptance cannot be accomplished within 10 or 20 days from date of delivery due to necessity for tests or analyses which cannot be accomplished within that time, delete, before issuance, the discount provision relating to 10 calendar days or to both 10 and 20 calendar days. The provision relating to discounts may also be deleted when funds do not become available so that payment may be made within such time limits.

5. If the contract is likely to involve patent liability, the article on patents as contained in U. S. Standard Form 32 should be used.

Rider

Motor Gasoline—Texaco Fire Chief Gasoline

Motor Oil—Texaco Motor Oil

Price paid shall be the Seller's posted retail service station price for Texaco Fire Chief Gasoline and/or Texaco Motor Oil (All Grades), in effect at time and place of delivery, including the Federal Tax, but exclusive of any State, County or Municipal Tax. In no event, however, will the prices paid by the Government during the contract

period in each state, exceed the following: Maximum prices quoted below include the Federal Tax.

State	Maximum Price Fire Chief Gasoline	Maximum Price Motor Oil
Alabama	$.1975 per gal.	$1.00 per gal.

(Items as to other states omitted from record by agreement.)

Radiator Anti-freeze.—The price paid shall be the Seller's posted retail service station price in effect at time and place of delivery. We are not indicating any maximum prices for this product, inasmuch as our posted retail service station price throughout the United States is based on competitive markets in each locality. No record of these prices are kept in this office, therefore, it is impossible to even determine a maximum price for this product. We assure you, however, that our price will at all times be competitive.

[fol. 173] The Texas Company has Service Station facilities in all principal Cities and Towns throughout the United States and has a total of approximately 45,000 Service Station outlets and are prepared to take care of your requirements satisfactorily.

[fol. 174] EXHIBIT "23"

Treasury Department,

Procurement Division,

Washington

September 27, 1935.

The Texas Company, 135 East 42nd St., New York, N. Y.

GENTLEMEN:

With further reference to your bid on gasoline submitted pursuant to specifications and proposals issued covering tank car requirements of all Federal activities in the United States there is enclosed Schedule of contracts for the Regions listed below which shows the items awarded either f.o.b. bulk plant or f.o.b. destination.

Special Condition, Schedule No. 1, is also included, and, as required by the sp-cification on which bids were submitted forms part of the contract.

This letter constitutes formal notice of acceptance of that part of your bid on which contract is based for the period October 1 to December 31, 1935.

The awards are indicated by "Tps." contract numbers shown opposite each item and all reference to the contract should refer to that number.

Regions 1, 2, 4, 5, 6.

Respectfully, H. C. Maull, Jr., Chief, Purchase Division.

Inc.

[fol. 175] Schedule No. 1

Issued by the Treasury Department,

Procurement Division, Branch of Supply, Federal Warehouse,

Washington, D. C.

Class 7.—Gasoline

Special Conditions

For the period January 1 to March 31, 1936

Tank Car, Tank Wagon, and Drum Deliveries

1. Gasolines must be in strict accordance with Federal Specifications, as follows:

Motor, United States Government—F. S. VV-G-101.

Motor-Fuel V (Proposed revision of F. S. VV-M-571, dated October 19, 1934) Two types with respect to octane number, viz.:

Octane number (min.) 65.

Octane number (min.) 75 (for use when equipment and type of service are such that fuel knock is troublesome with fuels of lower octane number).

2. Contracts executed hereunder will not include requirements of the Navy Department for marine deliveries, i. e.,

deliveries into tanks or drums of vessels at contractor's terminal or by contractor's barges in bulk or drums. The Navy Department will make contracts covering its requirements, and of other Federal activities which can participate advantageously thereunder, for marine deliveries. Navy contracts will also cover its requirements in other forms of delivery to Naval shore stations at which gasoline may be required for issued to vessels.

3. Bids on tank wagon and/or metal drum (or barrel) requirements are not solicited on the basis of individual activites for deliveries at specified locations, but are solicited on the basis for deliveries to Federal activities within a defined area, herein termed a zone—each state is divided into a number of zones, a particular zone including the counties named therefor in Schedule #2. The estimated requirements shown in Schedule #2 for tank car shipments, and tank wagon and/or drum deliveries, are given for general information only. Even though no estimated quantities may be indicated in schedule #2 for certain items for tank wagon and/or drum deliveries, bids are desired thereon. Although award may be made for shipments or deliveries, as the case may be, under an item, the Government will not be obligated to make any purchases thereunder should no activity require shipments or deliveries under the item. A contractor will be required to furnish such quantities under the item or items for which award is made that may be ordered during the contract period. It is impracticable to determine the quantifies that will be required under any item during the contract period, and for tank wagon and drum requirements to list the points of deliveries for all activities and to state the quantities required in each zone. No bid will be considered on a tank wagon and/or drum delivery item which is conditioned on one form of delivery, i. e., on either tank wagon or drum delivery only. No bid will be considered which provides that the Government shall guarantee to take any definite quantity.

4. Flat price bids will not be considered.

5. Bids must be submitted at definite maximum unit prices which the Government will be required to pay during the life on any contract executed hereunder. Only bids quoting a single maximum price for an item will be con-

sidered. Bidders may quote on any or all items herein listed. The bidder certified that the prices quoted in Schedule #2 are exclusive of any Federal, state, county or municipal tax and that no Federal, state, county or municipal tax will be added to any of the prices for deliveries made under any contract executed hereunder. As indicated on the bidding sheets of Schedule #2 for tank wagon and/or drum deliveries, bids are desire- covering deliveries [fol. 176] on a zone-wide basis bids limiting deliveries to certain counties only of a zone, or to a stipulated radius from a bulk plant, will not be considered.

6. Under any contract executed hereunder, when the contractor's open market price less Federal Tax, state, county and municipal taxes, less any applicable discount provided under the contract, at time and place of delivery under an item, is less than the maximum price therefor, the Government will pay said lower price. Each bill, or invoice, submitted shall show contractor's open market price in effect on date and place of delivery.

7. If quantity discounts are offered by a bidder they shall apply on the total monthly deliveries to all activities purchasing under any contract executed hereunder, and shall be allowed to the different activities. Contractor shall withhold rendition of monthly bills until he has definitely determined the net cost to the Government—a voucher covering deliveries on which the greatest quantity discount is not allowed must be supported by a showing *a* total deliveries during the month under the contract. Contractor shall furnish to Procurement Division a monthly statement showing the total quantity of each item purchased by each activity during each month.

8. Orders will be placed and payments made by the activity concerned.

9. Each delivery must be accompanied by a delivery ticket.

10. Tank wagon and drum requirements shall be delivered free of all delivery expense.

11. Unless otherwise stated in his bid, contractor shall be in a position to make tank wagon and drum (by truck) deliveries within 48 hours after receipt of order, and in case of shipments to deliver the same to common carrier

within 48 hours after receipt of order. If the contractor fails to complete deliveries within the time agreed upon, the Government reserves the right to purchase the delinquent portion in the open market and to charge the increased cost, if any, to the contractor.

12. When delivery in drums is ordered by an activity, it is intended that contractor's drums will usually be supplied. The contents of contractor's drums upon delivery will be immediately transferred to Government-owned containers if such are available. Contractor's drums not returned to the contractor or to a common carrier (for shipment to the contractor), within the free time allowed by the contractor, will be invoiced to and paid for by the Government at applicable price per drum. If, however, such drums in good condition are, after having been paid for, returned by the Government at the expense of the Government within 12 months after date of delivery of the commodity, the contractor will allow the price paid for each drum so returned. Drums furnished by contractor must be in accordance with Interstate Commerce Commission Specification #5.

13. When an activity orders deliveries to be made in Government-owned drums, they will be delivered by and at the expense of the Government to the contractor's plant or station. The subsequent delivery of the filled drums from the contractor's plant or station to the Government activity to be by and at the expense of the contractor.

14. The unit of quantity of gasoline for deliveries in tank wagons or drums is the gallon of 231 cubic inches, with no corrections for variations in temperatures.

15. Where bids on tank car requirements in Schedule #2 are called for f. o. b. bidder's bulk plant and also f. o. b. destination (delivery on railroad tracks of the ordering activity), the Government reserves the right to make award on either basis. For items awarded f. o. b. bidder's bulk plant, shipments will be made on Government bill of lading to be furnished by the activity concerned.

16. In determining awards for tank car items on which bidders are to quote in Schedule #2 prices f. o. b. their bulk plants, consideration will be given to transportation costs based on published rates, less land grant allowances, if any, or on lower special rates which may have been quoted

by carriers—special rates must be filed with the Procure-
[fol. 177] ment Division, Branch of Supply, Treasury Department, Washington, D. C., not later than the date of opening of bids.

17. Tank car requirements may be shipped in Government-owned cars if so directed by the activity concerned.

18. For shipments in tank cars other than Government-owned, contractor shall state on delivery ticket the capacity of the car when shell is full, the number of gallons per inch in dome, and the number of gallons for each of the first four inches out of the shell. This information must be furnished with each shipment in other than Government owned, tank cars, so that the receiving officer may be in a position to determine the quantity of gasoline in cars upon arrival. If a contractor's tank car is received more than four inches out of a shell, the receiving officer will gauge the car and determine the quantity by correspondence with contractor.

19. Contractor shall furnish with each tank car shipped, a delivery ticket showing number of gallons, temperature of gasoline and outage (in dome or shell, as the case may be) when loaded and measured.

20. The unit of quantity of gasoline for tank car shipments is the gallon of 231 cubic inches at a standard temperature of 60° F. Volume correction for the temperature at time of delivery at destination shall be as follows:

For each degree below 60° there shall be added, and for each degree above 60° there shall be deducted, .05 of one percent from the measured or gauged quantity.

21. The right is reserved to add to any contract awarded on basis tank car price f. o. b. contractor's plant, requirements for tank car shipments to destinations other than those listed in Schedule #2.

22. A contractor shall furnish analyses (giving results for the various test factors enumerated in the above stated applicable Federal Specification) which are representative of deliveries as follows:

Weekly deliveries for each grade (and type) of gasoline made by tank wagon and drum—one copy each week to the Procurement Division.

Tank car shipments—three copies for each car shipped—one copy to the Procurement Division and two copies to the activity concerned.

NOTE.—The samples tested (to obtain the above representative weekly analysis) shall be from shipments from refinery or refineries for distribution to localities where tank wagon and drum deliveries are to be made to the Government.

23. Gasoline will be sampled when, in the opinion of the Government activity concerned it is desirable to do so. Test results of a sample shall be used as representing only the quantity (delivery) actually sampled. Samples shall be taken in accordance with methods of Federal Specification VV-L-791a, which methods are reprinted, verbatim, in pamphlet issued June 1, 1935, by and may be obtained from the Branch of Supply, Procurement Division, Treasury Department. Samples will be tested by the U. S. Bureau of Standards.

24. Should test results reported by the Bureau of Standards show gasoline to not comply with the specification, the Government may, as its option:

(a) Exercise its right to reject the quantity of gasoline represented by the sample tested, or such part thereof which has not been consumed or mixed with other deliveries, and required that it shall be removed by and at the expense of the contractor promptly after notification of rejection and to require the contractor promptly to replace the quantity rejected with like quantity of specification quality without cost to the Government; or

[fol. 178] (b) For gasoline not rejected, due to the fact that it may have been mixed with other gasoline in tanks, or a portion of the delivery may have been used, or necessity requires its continued use—payment therefor shall be made at a reduction in price to be determined by the Government. (See paragraph 3 of Conditions, of Standard Form 33.) (Revised.)

Provided, however, the Government shall have the right, should test results of samples representing three or more deliveries to an activity under a contract show gasoline to be in any way inferior to contract requirements, to decline to accept additional deliveries and purchase gasoline in the

open market for delivery to such activity, in which event the contractor and his sureties shall be liable to the Government for any excess cost occasioned thereby.

25. It is understood that, under an item for tank wagon and/or drum delivery, the contractor will deliver gasoline from tank wagons or trucks directly to the fuel tanks attached to or part of trucks, tractors and other motorized equipment belonging to the military forces of the United States or of any state, when such trucks, tractors and other motorized equipment are being used on special manouvers away from their base of supply, or when such trucks, tractors and other motorized equipment are being moved from one military post to another.

26. The needs of the Bureau of Air Commerce, primarily for beacon lights, call for an unleaded gasoline of grade VV-G-101. Accordingly, contractors receiving orders from the Bureau of Air Commerce, or from any other activity must deliver unleaded VV-G-101 gasoline when so ordered.

27. Unnecessary "riders", merely duplicating conditions stated in the schedules or duplicating data entered on Standard Form 33 (Revised) or on Schedule #2 serve no useful purpose, are confusing, and are not desired. Bidders are cautioned not to attach such "riders". Should such a "rider" be attached to a bid and should it cause confusion, in the opinion, of the Government, the right to reject the bid is reserved to the Government.

28. No bid bond is required. A performance bond will be required for not less than 10 percent of the amount (estimated) of the contract.

NOTE.—Bidder may retain this Schedule—it is not necessary to return it with the three copies each of Standard Form 33 (Revised) and Schedule #2.

(Copy of this Schedule is to be incorporated in the contract.)

Schedule No. 2. Region No. 2.

Issued by the Treasury Department,
Procurement Division, Branch of Supply,
Washington, D. C.

Gasoline

Class 7

Schedule of Contracts for Tank Car Requirements in the States of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Virginia, North Carolina, South Carolina, Tennessee.

(Region No. 2)

For the Period October 1 to December 31, 1935

1. These consolidated contracts cover the requirements of the Federal activities hereinafter listed.

[fol. 179] 2. Attached is a copy of Schedule No. 1, entitled SPECIAL CONDITIONS, which is a part of each contract.

3. The right is reserved to add to any contact, awarded on basis tank car price f. o. b. contractor's bulk plant, requirements for tank car shipments to destinations other than those hereinafter listed.

4. For an item which specifies price "f. o. b. bidder's bulk plant" the Government is to pay the freight—shipment to be on Government bill of lading. For an item which specifies price "For delivery f. o. b. destination" (delivery on tracks or railroad serving the activity) the cont-actor is to pay the freight.

5. When bids were under consideration for a f. o. b. bulk plant item, freight rates (less land grant allowances, if any) to the activity from the different bulk plants named in the bids were considered in determining award. An activity ordering shipment under a f. o. b. bulk plant contract should definitely ascertain the route via which lowest freight rate applies, consideration being given to land grant allowances, if any. If routing and freight rate are desired, they may be obtained from the Procurement Division upon application.

6. Each bill, or invoice, submitted shall show the contractor's open market price, plus Federal tax, less State, county

and municipal taxes, in effect on date and place of shipment (the bulk plant specified for the item).

7. Under an f. o. b. bulk plant contract the contractor bulk plant open market price on date of shipment, plus Federal tax, less State, county and municipal taxes, shall not exceed the maximum price stated herein for the item.

8. Under an f. o. b. destination contract the contractor's bulk plant open market price on date of shipment, plus freight (paid by the contractor), plus Federal tax, less state, county and municipal taxes, shall not exceed the maximum f. o. b. destination contract price stated herein for the item.

9. The maximum prices stated herein for the respective items include the 1¢ per gallon Federal tax and no State or local tax.

10. In column headed "Grade", the three Federal Specification gasolines are abbreviated, i. e.; G-101, for Motor, U. S. Government VV-G-101; A-65 or A-75 for Motor-Fuel A; V-65 or V-75, for Motor-Fuel V. There is no octane number requirement for the VV-G-101 gasoline. The minimum octane number requirements for the Motor-Fuel A and Motor-Fuel V gasolines are as indicated by the figures 65 and 75.

Item No.	Activity-Destination	Grade and Octane Number (Min.)	Price-Maximum Per Gal.	Tps. Contract Number
(Omitted items relate to states other than Ala. and are omitted by agree— of the parties)				
181.	Q.M., Fort McClellan, Ala.....	A–65		
	F.o.b. bidder's bulk plant.....	....	$0.07	8068
	Location of bulk plant, Mobile, Ala.			
	Railroad serving, G. M. & N.			
182.	Q.M., Maxwell Field, Ala.....	A–65		
	F.o.b. bidder's bulk plant.....	....	.07	8068
	Location of bulk plant, Mobile, Ala.			
	Railroad serving, G. M. & N.			
183.	T.V.A., Wilson Dam, Ala.....	A–65		
	F.o.b. bidder's bulk plant.....	....	.07	8068
	Location of bulk plant, Mobile, Ala.			
	Railroad serving, G. M. & N.			
187.	Q.M., Fort Benning, Ga.....	A–65		
	F.o.b. bidder's bulk plant.....	....	.07	8068
	Location of bulk plant, Mobile, Ala.			
	Railroad serving, G. M. & N.			
[fol. 180]				
189.	CCC–Q.M., Fort Oglethorpe, Ga.....	A–65		
	F.o.b. bidder's bulk plant.....	....	.07	8068
	Location of bulk plant, Mobile, Ala.			
	Railroad serving, G. M. & N.			

Contract number	Contractor	Address
Tps. 8068	The Texas Company	135 East 42nd Street, New York, N. Y.
" 8546	Sinclair Refining Company	45 Nassau Street, New York, N. Y.
" 8040	Gulf Refining Company	1515 Locust Street, Philadelphia, Pa.
" 8065	Standard Oil Co., Inc. in Kentucky	426 West Bloom Avenue, Louisville, Ky.
" 8547	Atlantic Refining Company	260 South Broad Street, Philadelphia, Pa.
" 8548	American Oil Company	American Building, Baltimore, Md.
" 8067	Standard Oil Company of New Jersey	26 Broadway, New York, N. Y.

Discounts

Tps. 8068 The Texas Company:
Time discount, 1 percent, 10 days.
" 8546 Sinclair Refining Company:
Time Discount, 1 percent, 10 days.
" 8040 Gulf Refining Company:
Time discount, 1 percent, 10 days.
" 8065 Standard Oil Co., Inc. in Kentucky:
Time discount, 1 percent, 10 days.
" 8547 Atlantic Refining Company:
Time discount, 1 percent, 10 days.
" 8548 American Oil Company:
Time discount, 1 percent, 10 days.
" 8067 Standard Oil Company of New Jersey:
Time discount, 1 percent, 10 days.

Treasury Department,

Procurement Division,

Washington, D. C.

Invitation No. 323-G-8

Region #2

New York, August 12, 1935.

Mr. Sherman Ford, Washington, D. C.

DEAR SIR:

We are attaching hereto copy of proposal which we are submitting to the above, proposal opening August 13th, covering the Motor Gasoline requirements of all Federal Activities in Region #2 during the three month period October 1 to December 31, 1935.

We would appreciate your arranging with the Bonding Company to furnish us with complete competitive information on these proposals.

Yours very truly, (Signed) Frank J. Shipman.

[fol. 181] 33

Invitation No. 323-G-8.
Contract No. ———

Invitation, Bid, and Acceptance

(Short Form Contract)

(Department or establishment:) Treasury Department, Procurement Division,

(Office or station:) Branch of Supply

(Address:) Federal Warehouse, Washington, D. C.

(Date:) July 29, 1935.

Invitation

Sealed bids, in Triplicate subject to the conditions on the reverse hereof, will be received at this office until 10:00

o'clock, a. m., August 13, 1935, and then publicly opened, for furnishing the following supplies, and/or services, for delivery *at* during the period October 1 to December 31, 1935, both dates inclusive.

(Name:) H. C. Maull, Jr., (Title:) Chief, Purchase Division.

Item No.	Articles or services.	Quantity.	Unit.	Unit Price.	Amount. Dollars.	Amount. Cents.

Region No. 2

Gasoline

To meet the requirements as specified in Schedule No. 1 and Schedule No. 2 which are a part of this invitation, if all Federal activities (except as stated in Schedule No. 1) for deliveries in tank wagon and drums, and of those activities listed in Schedule No. 2 for shipments in tank cars, in the States of Alabama, Louisiana, South Carolina, Arkansas, Mississippi, Tennessee, Virginia, Florida, Georgia, North Carolina.

NOTE.—Service station deliveries or deliveries by barges and vessels, are not included in this invitation.

Bid

(Date:) —— —, ——.

In compliance with the above invitation for bids, and subject to all the conditions thereof, the undersigned offers, and agrees, if this bid be accepted within — days from the date of the opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, f. o. b., see above and, unless otherwise specified within — days after receipt of order.

Discounts will be allowed for payment as follows: 10 calendar days — percent; 20 calendar days, — percent; 30 calendar days, — percent.

T/W & S/B—Net 30 days
T/C 1% 10 days

Bidder: The Texas Company, Address: 135 E. 42nd St., New York, N. Y., by (Signature of person authorized to sign this bid:) —— ——, Title: Manager.

Acceptance by the Government

(Date:) —— —, ——.

Accepted as to items numbered.

Name: —— ——, Title: ——.

[fol. 182] Conditions

1. The Government reserves the right to reject any or all bids, to waive any informality in bids and, unless otherwise specified by the bidder, to accept any item in the bid. In case of error in the extension of prices in the bid, the unit prices will govern.

2. Time, in connection with discount offered, will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter date is later than the date of delivery.

3. In case of default of the contractor, the Government may procure the articles or services from other sources and hold the contractor responsible for any excess cost occasioned thereby: Provided, That if public necessity requires the use of materials or supplies not conforming to the specifications they may be accepted and payment therefor shall be made at a proper reduction in price.

4. No member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit.

5. Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of this bid, and made applicable directly upon the production, manufacture, or sale of the supplies covered by this bid, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and

any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

6. Unless otherwise specified by the bidder, it is understood and agreed that only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States shall be delivered pursuant to a contract awarded as a result of this bid.

7. Bids are requested on the basis that if subsequent legislation shall require observance of minimum wages and/or maximum hours of employment and/or limitation as to age of employees, in the performance of Government contracts any contract entered into shall be subject to modification to accord with such statutory requirements to the extent authorized or required by law.

Instructions to Bidders

1. Samples of items, when required, must be furnished, free of expense, prior to the opening of bids, and, if not destroyed, will, upon request, be returned at the bidder's expense.

2. Prices should be stated in units of quantity specified, with packing included.

3. Time of proposed delivery must be stated in definite terms. If time varies for different items the bidder shall so state.

4. Envelops containing bids must be sealed and marked on the upper left-hand corner with the name and address of the bidder and the date and hour of opening, and addressed as instructed.

5. To insure prompt payment, the original bill only should be certified as follows: "I certify that the above bill is correct and just, and that payment therefor has not been received."

6. For further instructions read U. S. Standard Form 22 (Instructions to Bidders).

[fol. 183] Instructions to Contracting Officers

1. If shipment is made by Government bill of lading, observe consolidated classification requirements so as to secure the lowest rate applicable.

2. Although this form meets the requirements of a formal contract (R. S. 3744), if the execution of a formal contract with bond is contemplated U. S. Standard Forms 31 and 32 should be used.

3. If there is not sufficient space on the schedule to list all of the items, insert at the bottom of the schedule "Continued on——sheets of U. S. Standard Form 36" and use that form also.

4. If it is definitely known that final acceptance cannot be accomplished within 10 or 20 days from date of delivery due to necessity for tests or analyses which cannot be accomplished within that time, delete, before issuance, the discount provision relating to 10 calendar days or to both 10 and 20 calendar days. The provision relating to discounts may also be deleted when funds do not become available so that payment may be made within such time limits.

5. If the contract is likely to involve patent liability, the article on patents as contained in U. S. Standard Form 32 should be used.

Rider

Tankwagon and/or Steel Barrel Delivery

States of:—Alabama—Mississippi—Florida and Georgia

The price paid shall be the Seller's posted tankwagon price for the grade of gasoline ordered and delivered, in effect at time and place of delivery, plus the Federal Tax, less $0.02 per gallon, price paid by the Government during the contract period, after deduction of the $0.02 per gallon discount offered above, will, in no event, exceed the maximum prices quoted herein, which prices include the Federal Tax.

States of:—Arkansas—Louisiana—South Carolina—Tennessee—North Carolina and Virginia

The price paid shall be the seller's posted commercial consumer tank car price for the grade of gasoline ordered and delivered, in effect at time and place of delivery, plus $.005 per gallon, plus the Federal Tax, price paid by the Government during the contract period, in no event to exceed the maximum prices indicated herein, which prices include the Federal Tax.

Tankcar Delivery—All States—F. O. B. Destination

The price paid shall be the Seller's tankcar price for the grade of gasoline ordered and delivered, as posted at Seller's terminal from which shipment is made (terminals are indicated under each item), on date of shipment, plus the Federal Tax, plus freight to destination, price paid by the Government during the contract period, in no event to exceed the maximum prices indicated herein, which prices include the Federal Tax and freight.

Tankcar Delivery—All States—F. O. B. Bidder's Bulk Plant

The price paid shall be the Seller's tankcar price for the grade of gasoline ordered and delivered, as posted at Seller's terminal from which shipment is made (terminals are indicated under each item), on date of shipment, plus the Federal Tax, price paid by the Government during the contract period, in no event to exceed the maximum prices quoted herein, which prices include the Federal Tax.

It is understood that the Texas Company will not charge the United States Government for any State, County or Municipal Taxes.

[fol. 184] Gas Reg. 2.
Schedule No. 2.
Bidding Form.
Issued July 29, 1935.

Opening Date, August 13, 1935.

To be Submitted in Triplicate

Specifications and Proposals

Issued by the Treasury Department,

Procurement Division, Branch of Supply, Federal Warehouse,

Washington, D. C.

Class 7.—Gasoline

For the Period October 1 to December 31, 1935

Tank Car, Tank Wagon, and Drum Deliveries

Region No. 2

1. Zones, and respective Counties therein, for each of the following named States:

Alabama

Zone 1:
Madison
Jackson
Marshall
De Kalb
Etowah
Cherokee
Calhoun
Cleburne
Talladega
Clay
Randolph

Zone 2:
Chilton
Coosa
Tallapoosa
Autauga
Elmore
Lowndes
Montgomery

Zone 2: (Continued)
Macon
Bullock
Butler
Crenshaw
Pike
Covington
Coffee
Geneva
Dale
Henry
Houston

Zone 3:
Chambers
Lee
Russell
Barbour

Zone 4:
Lauderdale

Zone 4: (Continued)
Colbert
Limestone
Lawrence
Morgan
Franklin
Marion
Winston

Zone 5:
Lamar
Fayette
Walker
Cullman
Blount
St. Clair
Pickens
Tuscaloosa
Jefferson
Bibb
Shelby

Zone 6:
Sumter
Greene
Hale
Perry
Choctaw
Marengo
Wilcox
Dallas

Zone 7:
Washington
Clarke
Monroe
Conecuh
Escambia
Baldwin
Mobile

Zones in other States omitted from record by agreement.

2. Bidder must state specifically below the trade or brand name of the gasoline, for the respective grades, he proposes to furnish. A trade or brand name for a gasoline offer will be regarded as a permanent representation of its characteristics and qualities.

G-101	Texaco	Firechief	Gasoline—Unleaded Gasoline will be furnished for Airway Beacons.
A-65	"	"	"
A-75	"	Ethyl	"
V-65	"	Firechief	"
V-75	"	Ethyl	"

3. Where metal drums (or barrels) are furnished by the contractor and are not returned to the contractor or to a common carrier (for shipment to the contractor) within 90 days after receipt by the consignee, they will be invoiced to and paid for by the Government at $6.00 per drum. If, however, such drums in good condition are, after having been paid for, returned by the Government at the expense of the Government within 12 months after date of delivery of the commodity, the contractor will allow $6.00 for each drum returned. (Bidder must fill in blank spaces—if not [fol. 185] filled in by bidder, it will be understood that the Government will not be liable or responsible for any failure to return drums.)

4. Bidders must state below, for tank wagon and drum deliveries, the method used for basing maximum prices and also the method which will be used for invoicing in event of award of contract, i. e., whether pricing (maximum and invoicing).

(I) is based on posted tank car price plus a fixed (or graduated amounts according to total monthly deliveries) number of cents (or fractions per gallon)—the fixed or graduated amounts to be specifically and clearly stated by bidder.

(Bidder) ——.

(II) is based on posted tank wagon prices less a fixed (or gaduated amounts according to total monthly deliveries) number of cents (or fractions) per gallon—the fixed or graduated amounts to be specifically and clearly stated by bidder.

I. (a) For basing maximum prices, See Rider.
I. (b) For invoicing, See Rider.
II. (a) For basing maximum prices, See Rider.
II. (b) For invoicing, See Rider.

5. Pages 6 and 7 of this Schedule and only those Price Bidding Sheets containing items on which bidder quotes prices must be returned with Standard Form 33. Bidder will please remove those Sheets containing items on which he does not quote prices. Bidder to state here the numbers of the Sheets returned.

Returning all Sheets.
(Bidder) ——.

NOTE.—In column headed "Grade", the three Federal Specification gasolines are abbreviated, i. e.: G-101, for Motor, U. S. Government VV-G-101; A-65 or A-75, for Motor-Fuel, A; V-65 or V-75, for Motor-Fuels V; There is no octane number requirements for the VV-G-101 gasoline. The minimum octane number requirements for the Motor-Fuel A and Motor-Fuel V gasolines are as indicated by the figures 65 and 75.

Alabama

Item No.	Zone	Grade	Estimated quantity gallons	Price maximum per Gal.
1	1	G-101	.....	$.1197
2	1	A-65	51,956	.1197
3	2	G-101	300	.1197
4	2	A-65	64,332	.1197
5	3	G-101	2,720	.1197
6	3	A-65	9,126	.1197
7	4	G-101	.....	.1197
8	4	A-65	175,268	.1197
9	4	A-75	4,000	.1397
10	5	G-101	14,500	.1197
11	5	A-65	23,615	.1197
12	6	G-101	.....	.1197
13	6	A-65	27,441	.1197
14	6	A-75	50	.1397
15	7	G-101	500	.1197
16	7	A-65	64,706	.1197
17	7	A-75	1,610	.1397
18	7	V-65	3,500	.1197

Items as to other States omitted from record by agreement.

[fol. 186] 323-G-8-13

Gas—Reg. 2

Tank Car Shipments

(Price Bidding Sheet)

Item No.	Activity—Destination	Grade and Octane Number (Min.)	Estimated Quantity Gallons	Price Maximum Per Gal.
181	Q.M., Fort McClellan, Ala.....	A–65	54,325	
	(a) For Delivery f.o.b. destination..	....	.....	0942
	(b) F.o.b. bidder's bulk plant.....	....	.....	0700
	Location of bulk plant Mobile, Ala.			
	Railroad serving G. M. & N.			
182	Q.M., Maxwell Field, Ala.....	A–65	47,840	
	(a) For delivery f.o.b. destination...	....	.....	0898
	(b) F.o.b. Bidder's bulk plant.....	....	.....	0700
	Location of bulk plant Mobile, Ala.			
	Railroad serving ——			
183	T. V. A., Wilson Dam, Ala.....	A–65	32,000	
	(a) For delivery f.o.b. destination...	....	.....	0942
	(b) F.o.b. bidder's bulk plant.....	....	.....	0700
	Location of bulk plant Mobile, Ala.			
	Railroad serving ——			

[fol. 187] EXHIBIT #24

Filed Oct. 24, 1935, O. D. Street, Clerk

United States Department of the Interior

Office of the Secretary,

Washington

October 4, 1935.

The Texas Company, 135 East 42nd Street, New York, New York.

GENTLEMEN:

With reference to your bid U. S. D. I. 910, which was opened in this Office on September 19, covering the proposed purchase of gasoline and lubricating oil for Bureau of Reclamation, The Administrative Division, Public Works Administration and other Interior Department activities, please be advised that you are hereby awarded a contract covering items as listed below and for the period as designated.

October 1, 1935 to June 30, 1936

Item Number	State	Maximum price per gallon: Regular Gasoline	High Test Gasoline	Lubricating Oil
1	Alabama	.198	.218	1.00
8	Florida	.175	.195	1.00
9	Georgia	.195	.215	1.00
15	Kentucky	.22	.24	1.00
25	Nebraska	.169	.189	1.00
29	New Mexico	.20	.22	1.00
34	Oklahoma	.1725	.1925	1.00
41	Texas	.172	.192	1.00

October 1, 1935 to December 31, 1935

Item Number	State	Maximum price per gallon: Regular Gasoline	High Test Gasoline	Lubricating Oil
3	Arkansas	.155	.175	1.00
5	Colorado	.243	.263	1.00
7	Delaware	.155	.175	1.00
11	Illinois	.148	.168	1.00
12	Indiana	.158	.178	1.00
13	Iowa	.16	.18	1.00
14	Kansas	.147	.167	1.00
16	Louisiana	.175	.195	1.00
18	Maryland	.155	.175	1.00
20	Michigan	.162	.182	1.00
21	Minnesota	.169	.189	1.00
22	Missouri	.143	.163	1.00
23	Mississippi	.185	.205	1.00
31	North Carolina	.171	.191	1.00
32	North Dakota	.18	.20	1.00
33	Ohio	.185	.205	1.00
38	South Carolina	.169	.189	1.00
39	South Dakota	.17	.19	1.00
40	Tennessee	.175	.195	1.00
44	Virginia	.176	.196	1.00
46	West Virginia	.166	.186	1.00
47	Wisconsin	.159	.179	1.00
48	Wyoming	.285	.305	1.00
49	District of Columbia	.148	.168	1.00

[fol. 188] This contract, number of which is I-S-1959, calls for the delivery from your service stations located in all the above mentioned states of Texaco Fire Chief gasoline and Texaco Ethyl gasoline in quantities as called for at the posted service station price in effect at time and place of delivery subject to the maximum price for each state as shown above.

Texaco Motor Oil is to be furnished at the posted retail service station price in effect at time and place of delivery with the guarantee that the maximum price chargeable will not exceed the price as quoted above.

The prices for all products quoted herein include only the Federal tax and do not include any state, local or non-applicable taxes. The Bureau of Reclamation, Administrative Division, Public Works Administration and the Indian Service have signified their intentions of participating in this contract and they are being furnished a copy of this award letter. These three bureaus and other services of the Interior Department are authorized to buy under this contract.

Each bureau making purchase will contact your office directly and it is hoped that satisfactory arrangements will be made for delivering the specified products to all employees who are properly identified and for rendering monthly invoices to each unit.

Reference: JCC—1935.

Very truly yours, W. B. Fry, Purchasing Officer.

U. S. Standard Form 33 (Revised).

Approved by the Secretary of the Treasury, Sept. 17, 1934.

Invitation No. 910.
Contract No. —.

Invitation, Bid, and Acceptance

(Short Form Contract)

(Department or Establishment) Department of the Inetrior
(Office or Station) Purchasing Office
(Address)——
(Date) —— —, ——.

Invitation

Sealed bids, in one copy only subject to the conditions on the reverse hereof, will be received at this office until 10:30 o'clock a. m., September 19, 1935, and then publicly opened, for furnishing the following supplies, and/or services, for delivery as listed herein.

(Name) W. B. Fry, (Title) Purchasing Officer.

Item No.	Articles or services.	Quantity.	Unit.	Unit Price.	Amount. Dollars.	Cents.

Gasoline and Lubricating Oil for Interior Department Activities
(Service Station Deliveries)

All the conditions of this advertisement will be incorporated as a part of any contract resulting therefrom, which shall cover the period from October 1, 1935, through June 30, 1936, but bidders may quote on a shorter period, if they so desire, but for not less

[fol. 189]

than three months.

The requirements estimated herein are those of the Bureau of Reclamation and the Administrative Division, Public Works Administration, only. The right is reserved, however, for any Bureaus of this Department to make purchase under this advertisement.

All prices quoted herein shall include any Federal tax but not to include any State or local tax.

It is agreed that if subsequent legislation shall require observance of minimum wages and/or maximum hours of employment, and/or limitations as to age of employees in the performance of Government contracts this transaction if not completed prior thereto, shall be subject to modifications to accord with such statutory requirements to the extent authorized or required by law.

Bid

(Date:) September 18, 1935.

In compliance with the above invitation for bids, and subject to all the conditions thereof, the undersigned offers, and agrees, if this bid be accepted within 30 days from the date of the opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, f.o.b. service stations as specified and, unless otherwise specified within 1 day after receipt of order.

Discounts will be allowed for payment as follows: 10 calendar days, Net percent; 20 calendar days, Net percent; 30 calendar days, Net percent.

Bidder: The Texas Company, Address: 135 East 42nd Street, New York, N. Y., by (Signature of person authorized to sign this bid:) —— ——, Title: Manager.

Acceptance by the Government

(Date:) —— —, ——.

Accepted as to items Number —.

Name: —— ——, Title: ——.

Conditions

1. The Government reserves the right to reject any or all bids, to waive any informality in bids and, unless otherwise specified by the bidder, to accept any item in the bid. In case of error in the extension of prices in the bid, the unit prices will govern.

2. Time; in connection with discount offered, will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those points, or from date correct bill or voucher properly certified by the contractor is received if the latter date is later than the date of delivery.

3. In case of default of the contractor, the Government may procure the articles or services from other sources and hold the contractor responsible for any excess cost occasioned thereby: Provided, That if public necessity requires the use of materials or supplies not conforming to the specifications they may be accepted and payment therefor shall be made at a proper reduction in price.

4. No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit.

5. Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed

by the Congress after the date set for the opening of this bid, and made applicable directly upon the production, manufacture, or sale of the supplies covered by this bid, [fol. 190] and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

6. Unless otherwise specified by the bidder, it is understood and agreed that only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be in the United States shall be delivered pursuant to a contract awarded as a result of this bid.

Instructions to Bidders

1. Samples of items, when required, must be furnished, free of expense, prior to the opening of bids, and if not destroyed, will, upon request, be returned at the bidder's expense.

2. Prices should be stated in units of quantity specified, with packing included.

3. Time of proposed delivery must be stated in definite terms. If time varies for different items the bidder shall so state.

4. Envelops containing bids must be sealed and marked on the upper left-hand corner with the name and address of the bidder and the date and hour of opening, and addressed as instructed.

5. To insure prompt payment, the original bill only should be certified as follows: "I certify that the above bill is correct and just, and that payment therefor has not been received."

6. For further instructions read U. S. Standard Form 22 (Instructions to Bidders.)

Instructions to Contracting Officers

1. If shipment is made by Government bill of lading, observe consolidated classification requirements so as to secure the lowest rate applicable.

2. Although this form meets the requirements of a formal contract (R. S. 3744), if the execution of a formal contract with bond is contemplated U. S. Standard Forms 31 and 32 should be used.

3. If there is not sufficient space on the Schedule to list all of the items, insert at the bottom of the schedule "Continued on —— Sheets of U. S. Standard Form 36" and use that form also.

4. If it is definitely known that final acceptance cannot be accomplished within 10 or 20 days from date of delivery due to necessity for tests or analyses which cannot be accomplished within that time, delete, before issuance, the discount provision relating to 10 calendar days or to both 10 and 20 calendar days. The provision relating to discounts may also be deleted when funds do not become available so that payment may be made within such time limits.

5. If the contract is likely to involve patent liability, the article on patents as contained in U. S. Standard Form 32 should be used.

Rider

Motor Gasoline

Regular—Texaco Fire Chief Gasoline

High Test—Texaco Ethyl Gasoline

The price paid shall be the Seller's posted retail service station price for grade of gasoline ordered and delivered, in effect at time and place of delivery, plus the Federal Tax, but exclusive of any State, County or Municipal Tax, with a guarantee that the price charged up to and including the date indicated for each item, will not exceed the maximum prices quoted herein, which prices include the Federal Tax.

Motor Oils

Texaco Motor Oil—All Grades

(Here follows one photolithograph, side folio 191)

The price paid shall be the Seller's posted retail service station price for Texaco Motor Oil in effect at time and place of delivery, including the Federal Tax, with a guarantee that the price charged up to and including the date indicated for each item, will not exceed the maximum prices quoted herein, which prices include the Federal Tax.

- -

We have indicated opposite each item, the number of service stations in each state, that will honor deliveries made with Texaco National Credit Cards or Texaco Commercial Order Books. We have not submitted a list, by states, of the towns in which service stations are maintained and from which deliveries may be made to you, for the reason that our bid covers the entire United States and the cost of compiling such a list would be excessive. We trust that information which your field men have obtained under previous contracts will be sufficient to enable you to make proper award.

We have also indicated for each item, by showing either the date December 31, 1935, or June 30, 1936, whether our proposal in these states covers the period October 1, 1935 to December 31, 1935 or for the nine month period, October 1, 1935 to June 30, 1936.

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Standard Form No. 30
Approved by the President
June 10, 1927

P. .. 40210

STANDARD GOVERNMENT FORM OF CONTINUATION SCHEDULE FOR STANDARD FORM 31 or33
(Supplies)

Item No.	Articles or services	Quantity	Unit	Unit Price	Amount Dollars	Cents
1.	Alabama: Number of Service Stations					
	Regular Gasoline	3000	gals.	w.19		
Prices good until June 30, 1936	High Test Gasoline 889	300	"	w.21		
	Lubricating Oil	150	"	w1.00		
	(Items as to other states omitted from record by agreement)					

Inasmuch as the quantities can only be estimated, the Government reserves the right to order only such quantities as are actually needed, as well as to purchase any additional gallonage as may be desired.

All gasoline furnished under requests for "regular" gasoline must be first grade, non-premium, to comply in all respects with Federal Specifications VV-G-101 and having a minimum octane rating of 65. Bids on the so-called "Third Structure" gasoline will not be considered.

Where "High Test" gasoline is specified, the product bid on must be one known commercially as first grade premium gasoline, containing Tetra-ethyl Lead and comply in all respects with Federal Specifications VV-M-571a.

Bids on lubricating oil must be on first grade non-premium oil, and must include all grades from SAE 20, through SAE 50.

The right is reserved to order any oil within the specified limits.

BIDDERS MUST STATE THE TRADE NAME OF ALL GASOLINES AND OIL OFFERED.

191

V022

[fol. 192] These requirements are for service station delivery and bids on any other type of delivery can receive no consideration. Since these products are for use by Field Employees of this Department, the ability of each bidder to make service station delivery will be taken into account when award is made.

Each bidder is requested to submit with his bid a list by states of towns in which service stations are maintained and from which delivery may be made.

Bids must be submitted on complete items, and failure to do so will be cause for the rejection of any bid.

Bids are requested on the basis that if subsequent legislation shall require observance of minimum wages and/or maximum hours of employment and/or limitation as to age of employees, in the performance of Governmental contracts, any contract entered into shall be subject to modification to accord with such statutory requirements to the extent authorized or required by law. Where the bidder agrees to this condition, and in the event of such legislation, it is contemplated that the contract shall be modified in conformity with the terms thereof, with right in contractor to be reimbursed the actual additional costs made necessary thereby. Bidders should state whether or not their bids are made on this basis.

Place on envelope:

"Bid on Gasoline and Lubricating Oil for Interior Department Activities, U. S. D. I, 910, opening at 10:30 A. M., September 19, 1935."

[fol. 193] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law

This cause coming on to be heard at this time on plaintiff's application for an interlocutory injunction as prayed in its bill of complaint, was submitted upon the bill of complaint as amended, the motion to dismiss and the answer of the defendants, the agreed statement of facts in writing and on file and a part of the record in this cause and the written affidavits introduced in evidence by the parties on

file and a part of the record in this cause, and was also by agreement of the parties, without plaintiff's waiving insistence on its said application for an interlocutory injunction, submitted for final decree upon the same pleadings and evidence, the parties being represented by their respective counsel.

Findings of Fact

The Court, upon consideration of the evidence in this cause, adopts as and for its findings of fact all the facts set forth in said written agreed statement of facts which is hereby referred to and expressly made a part hereof as fully and completely as if set out at length herein, and the following facts in addition thereto:

(1) The amount involved in this proceeding is in excess of $3,000.00, exclusive of interest and costs.

(2) As admitted by the defendant orally in open Court, the State officials have not claimed or sought to collect any taxes imposed by said gasoline excise tax acts with respect [fol. 194] to the gasoline stored in Alabama and withdrawn from storage for sale and delivery in interstate commerce.

Conclusions of Law

The Court's conclusions of law are as follows:

(1) The Alabama gasoline excise tax statutes set forth in the bill of complaint impose taxes on persons and other parties engaged in the State of Alabama in the business of selling, distributing, storing or withdrawing from storage for any purpose whatsoever gasoline and other liquid motor fuels. The statutes classify three different kinds of businesses, namely: First, selling; secondly, distributing; and thirdly, storing or withdrawing from storage such commodities. In each instance the tax is measured by the number of gallons sold, distributed or withdrawn from storage, but a tax on the business of storage alone is not imposed, the tax being only on the withdrawal from storage where such withdrawal is for use other than for sale. Double taxation is not imposed, it being the intention that the tax with respect to the same gasoline shall be paid but once. A person may be engaged in any or all of the businesses taxed, but as to the gasoline he sells he is only required to pay a tax measured by the amount of the gasoline sold, and does not

have to pay any additional or other tax for the distribution or withdrawl from storage of the gasoline which he sells. As to the gasoline which is sold the tax is measured exclusively by the number of gallons sold.

(2) The gasoline excise tax acts are unconstitutional and void in so far as they impose an excise tax on account of or with respect to sales of gasoline to the United States measured by the number of gallons sold to the United States.

(3) Even should the statutes be treated as imposing a privilege tax measured by the quantity of gasoline withdrawn from storage for sale and delivery to the United States, the necessary effect would be the same as if the tax were measured by the quantity sold, as in both instances the price to the Government for such commodity would be [fol. 195] increased by the amount of the tax, and the tax burden in each case would necessarily and directly fall on the United States. The Constitution of the United States not only forbids the imposition of an excise tax on account of or with respect to gasoline sold to the United States measured by the number of gallons so sold, but also forbids the imposition of such a tax on account of or with respect to gasoline withdrawn from storage for sale and delivery to the United States as so measured.

(4) The plaintiff has no adequate remedy at law in the premises. If it paid under protest the illegal taxes demanded by the State as they monthly mature, plaintiff would be under the necessity of instituting a multiplicity of suits for their recovery. Failure to pay the taxes imposed under the present act subjects the tax payer to a penalty of twenty-five per cent of the amount thereof, and a lien for the taxes and penalties attaches to the property of the taxpayer located in the state.

(5) As final decree is at this time being entered in this cause, it is unnecessary for the Court to grant or act separately on plaintiff's application for an interlocutory injunction.

Done this 7 day of December, 1935.

Robert T. Ervin. C. B. Kennamer.

[fol. 196] In United States District Court for the Northern Division of the Middle District of Alabama

In Equity. No. 662

The Texas Company, a Corporation, Plaintiff,

vs.

Albert A. Carmichael, Attorney General of the State of Alabama, Henry S. Long, President of the State Tax Commission of Alabama, and John P. Kohn, Sr., and W. W. Ramsey, Associate Members of the State Tax Commission of Alabama, and Bibb Graves, Governor of the State of Alabama, Defendants

Decree

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

(1) The motion of defendants to dismiss the bill of complaint be and the same hereby is overruled.

(2) The defendants, Albert A. Carmichael, as Attorney General of the State of Alabama, Henry S. Long as President of the State Tax Commission of Alabama, and John P. Kohn, Sr., and W. W. Ramsey as associate members of the State Tax Commission of Alabama, and Bibb Graves as Governor of the State of Alabama and each of them, be and they hereby are restrained and enjoined from taking any steps or instituting any legal proceedings, civil or criminal to execute or enforce the provisions of the Statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of the gasoline or other liquid motor fuels sold, distributed or withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on The Texas Company, measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States or withdrawn from storage and which is sold and

delivered to the United States by it or for its account under [fol. 197] contracts between it and the United States.

(3) The defendants be and they hereby are taxed with the costs of this proceeding for which let execution issue.

Dated this 7th day of December, 1935.

C. B. Kennamer. Robert T. Ervin.

[fol. 198] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE ACCEPTANCE OF SERVICE, ETC.

Before the Honorables J. C. Hutcheson, Circuit Judge, and Robert T. Ervin and Charles B. Kennamer, District Judges, Composing the Court Consisting of Three Judges under Section 380 of Title 28 of the United States Code Annotated (Judicial Code Section 266 Amended)

It is hereby stipulated by and between counsel for plaintiff and defendants in the above styled cause that the defendants and each of them, by and through their counsel of record, accept service of the writ of injunction as ordered and decreed in the final decree in said cause of date December 7th, 1935, and agree in all respects to be bound thereby until the further orders of the Court, and it is agreed that the issuance and service of any other writ or notice is hereby waived.

Albert A. Carmichael, Attorney General of the State of Alabama; Frontis H. Moore, Asst. Atty. General of the State of Alabama; Peyton Bibb, Spec. Asst. Atty. General of the State of Alabama; Thomas J. Judge, Farley Bldg., Birmingham, Ala.; Richard T. Rives, Montgomery, Alabama, Attorneys for Defendants. John S. Coleman, Birmingham, Alabama; Bradley, Baldwin, All & White, Birmingham, Ala., Attorneys for Plaintiff.

[fol. 199] IN UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF ALABAMA

Number 662

THE TEXAS COMPANY

vs.

CARMICHAEL et al.

John S. Coleman, Solicitor for Plaintiff.
Bradley, Baldwin, All & White, of Counsel.
Albert A. Carmichael, Frontis H. Moore, Peyton Bibb, Thomas J. Judge, Richard T. Rives, Solicitors for defendants.

OPINION

Opinion by ERVIN, Judge, concurred in by KENNAMER, Judge:

This is a bill seeking to enjoin the State of Alabama from levying an excise tax on such gasoline as the complainant sells to United States Government, in which it is contended that such tax would be unconstitutional if so levied.

Hearing was had before Joseph T. Hutcheson, Circuit Judge, R. T. Ervin, and C. B. Kennamer, District Judges, on an agreement that the matter would be submitted both for a preliminary and final injunction. The submission was on an agreed statement of facts.

In this case it is contended that the Alabama statute levying an Excise Tax on gasoline is unconstitutional in so far as it undertakes to tax a sale of gasoline to the Government.

In Section 1 of the Act of 1927 amending the Act of 1923, we find a tax levied in the following words:

"To impose an excise tax on persons, corporations, co-partnership-, companies, agencies or associations *engaged in the business of selling, distributing, storing or withdrawing from storage* for any purpose whatsoever gasoline or other liquid motor fuel or device or substitutes therefor in this State; and providing for the collection and payment of such tax and distribution of the funds derived therefrom, and providing for its enforcement and fixing a penalty for the violation of any of the provisions hereof."

It will be noticed that the tax is levied on persons "engaged in the *business* of *selling,* distributing, storing or withdrawing from storage for any purpose whatsoever."

It will be observed then that the statute classified three different operations as separate businesses, namely: first, [fol. 200] selling; secondly, distributing; thirdly, storing or withdrawing from storage the gasoline. Other portions of the Act define these various businesses.

"The term 'distributor' shall include any person who shall engage in the selling of gasoline as herein defined in this state by wholesale in domestic trades but shall not apply to any transaction by such distributor in interstate commerce. The term 'retail dealer' shall include any person herein defined as a distributor who is also engaged in the sale of gasoline as herein defined, at any place in this state in broken quantities.

The term 'storer' as herein used shall include any person who ships gasoline into this State, in tank quantities and stores the same and withdraws or uses the same for any purpose."

Section 3 of the Act provides:

"every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the *selling,* distributing or withdrawing from storage for any use gasoline as herein defined in this State."

Here the tax is to be paid, not on the storage but on the sale, distribution or withdrawal from storage.

It further provides:

"The excise tax imposed by subdivision (a) of this section shall apply to persons, firms, corporations, dealers or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage, whether such withdr-wals be for *sales* or other use—provided, that *'sellers'* of gasoline and its substitutes paying the tax herein provided may pay the same *computed and paid* on the *basis of* their *sales* as hereinafter required and storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions." (All italics mine.)

It is observed:

"That sellers of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required, and storers and distributors shall compute and pay this tax on the basis of their withdrawals and distributions."

Certainly sales are computed as such, while users are to be computed on the basis of withdrawals or distributions. How can it be contended then that sales are to be computed and paid as on storage? If sales are to be computed and paid on the basis of their sales how can it be contended that such sales are to be computed on the storage of gasoline?

The Act provides for monthly reports showing the amount of gasoline sold or withdrawn. Reports shall be sworn to. The Act also imposes a penalty of 25% for failure to make this report.

[fol. 201] There are several other Acts passed imposing additional taxes aggregating six cents per gallon, but they contain the same verbiage so the construction of one applies to all.

These definitions are the same in the Act approved January 31, 1935, and also in the Act of July 10, 1935, where the definition of a storer is in the following words:

"The term 'Storer' as herein used shall include any person who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any amount and withdraws or uses the same for any purpose."

It is contended by defendants that the tax is on the storage of gasoline measured by the number of gallons withdrawn from storage regardless of the purpose for which such withdrawals were made.

The Constitution, in effect, forbids the use of either sales or withdrawals of gasoline as a measure for state taxation, when made either in interstate transactions or in direct sales to the government.

In the first place we see the tax is levied on persons engaged in these separate businesses dealing in gasoline, and not anywhere on the gasoline dealt in.

First, are those engaged in the business of selling gasoline, such as retail dealers who store the gasoline in tanks

and withdraw it from tanks and deliver it into autos and such vehicles as may buy it, in other words, filling stations.

Second, the distributors or wholesalers.

Third, storers, persons who ship gasoline into the state in tank quantities and withdraw or use it for any purpose.

In each instance the tax is 'measured by' the number of gallons sold, distributed or withdrawn. It nowhere imposes a tax on storage alone.

It is manifest that no double taxation is imposed. It is also manifest that one person may be engaged in one or all these businesses, but without increasing the tax he is required to pay. If he sells the gasoline he pays so much a gallon for such as he sells, but does not have to pay an additional tax for the distribution or withdrawal of such as he has sold.

[fol. 202] Recognizing that all dealers in gasoline must first store it, Section 156.2 of the Act of 1935 says:

"The excise tax imposed by Section 156.1 hereof shall apply to persons defined in this chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for *sale* or other *uses.*"

It is manifest that retail dealers or filling station operators must first store the gasoline in their tanks before they can retail it. The Act manifestly contemplates that the retail dealers and distributors will be engaged in selling gasoline while the storer does not sell it but uses it himself in some way, so that he is taxed not on the sale but on the use of the gasoline he withdraws from storage. This tax must have been imposed to cover those who brought gasoline into the state in large quantities and stored and withdrew it as needed for use to save paying the tax.

These people do not sell gasoline but use it in their own vehicles or engines.

This is what the Alabama Supreme Court had before it in the case of State vs. City of Montgomery 229 Ala. 93, where it is said:

"a tax upon the separate acts of the owner in taking his property out of storage for his own use."

"The acts in question impose a tax upon a *storer as well as* upon a *distributor* or *dealer.*"

So a storer is one who stores for his own use and not for the purpose of sale, and the tax is levied only where he withdraws the gasoline for his own use.

The Act expressly recognizes the fact that both dealers as well as users may store gasoline and withdraw it from storage where it says:

"Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the *selling*, distributing or withdrawing from storage for any use gasoline as herein defined in this State."

This seems to me to recognize the proposition that the tax is imposed not on the storage but on the use for which it is withdrawn.

In Edelman vs. Boeing Air Transp., 289 US 252, it is said:

"It is at the time of withdrawal alone that 'use' is measured for the purpose of the tax.

* * * * * * *

A State may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the state and [fol. 203] placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce."

The Act and the practice of the state has been where gasoline was withdrawn from one place of storage and placed in another no tax was imposed, yet here was a withdrawal from storage, but the purpose was not to use it or sell it, so again it was the use for which the withdrawal was made that determined whether the tax was imposed.

Suppose a man builds a large tank and stores gasoline for others at a price, he never sells or uses it, they withdraw it and place it in their filling stations for sale. He is in the business of storing gasoline, but he would pay no tax.

Or, if one figured the price would go up and he bought and stored gasoline in large quantities during a period of more than a year, he would pay no tax for that year. So we see the tax is not levied on the storage but on the use for which it is withdrawn.

Again Section 3a says:

"Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents a gallon upon the selling, distributing, or withdrawing from storage for any use gasoline as herein defined in this state, provided however, that this excise tax shall not be levied upon the *sale of gasoline in interstate commerce.*"

Why not add "or to the United States" for the one is as much protected by the Federal Constitution as the other.

Now if the withdrawal from storage of gasoline on a sale in interstate commerce is not to be taxed, why should not a sale to the U. S. Government also be exempt?

In the instant case we are not concerned with the withdrawal for use, but with the sale by one who is either a retail dealer or a distributor, or both, to the Federal Government, which seems to me to bring the facts in line with the case of Panhandle Oil Co. vs. Knox, 277 U. S. 218, where the Court says:

"The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of Federal functions.

* * * * * * *

While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon the trans- [fol. 204] actions by which the United States secures the things desired for its governmental purpose.

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The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government.

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Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests.

* * * * * * *

To use the number of gallons sold to the United States as a measure of the privilege tax is in substance and legal effect to tax the sale.

* * * * * * *

And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State."

If a sale by a dealer is reported as such and the tax so paid, it cannot be again imposed as on a withdrawal of the same gasoline.

The case of State vs. Montgomery ante; Nashville C. & St. L. Ry. vs. Wallace, 288 U. S. 249; and Edelman vs. Boeing Air Transp. 288, U. S. 249, involved only the withdrawal for use and not sales to the Government, and what was said would be applicable only to that feature of the Act. No right is claimed in the instant suit as to gasoline used by complainant.

It is urged that State vs. Montgomery is a construction of the Act and is binding on this Court, but it did not involve the question here presented.

Even if it did it would not bind this Court on the Federal question as to whether a sale by a dealer to the Government was exempt from state taxation.

In the Panhandle case the Mississippi Act levied a tax on the business of selling or distributing gasoline, and the Court held it invalid as to sales to the Government as the effect was to raise the price the Government would have to pay for the gasoline.

Here the tax is levied on persons engaged in the business of selling and distributing gasoline. Certainly the effect of this Act will be to raise the price the Government will have to pay for gasoline in Alabama.

"To use the number of gallons sold to the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. * * *

And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State." Panhandle Oil Co. ante.

[fol. 205] I see no difference between the two cases.

Even treating it as a tax on the withdrawal for the purpose of a sale to the Government it would make no differ-

ence as the effect would be the same, viz: to increase the price to the Government. On the argument it was admitted that if the tax was levied on the sale to the Government it would be invalid.

Then why would it not be invalid if the tax is levied on the withdrawal on a sale to the Government, as the effect would be the same?

The Court will look beyond the mere phraseology to get the substance and effect, and so judge the transaction.

It is said, however, that the plaintiff should wait until sued and then raise the question as a defense, but the Act imposes heavy penalties to be determined by the taxing authorities and they have made demand for the disputed tax, interest and penalties, and under the rule laid down in Pennsylvania vs. West Virginia, 262 U. S. 592:

"One does not have to await consummation of threatened injury to obtain preventative relief. If the injury is certainly impending that is enough."

I feel constrained to hold that so far as the Act undertakes to tax a sale to the Government, it is violative of the Federal Constitution and should be enjoined. The Act contemplates sales to be made after its passage.

[fol. 206] IN UNITED STATES DISTRICT COURT

DISSENTING OPINION

HUTCHESON, J., dissenting:

Plaintiff's bill, while general as to the collection of gasoline taxes on all sales made and to be made by it to the agencies of the Federal government, really was in two distinct portions, had two distinct objects. One was to enjoin the prosecution of suits against it on account of taxes on gasoline stored and withdrawn for sale to government agencies through a past five year period, when the ruling and recognition of the State authorities was that these sales were exempt from the tax. The other was to enjoin the claim and collection of taxes in the future on gasoline which, under sales contracts it pleaded it had made with

the United States, it would in future withdraw from storage and sell and deliver to agencies of the United States.

Upon the plainest principles, I think the collection of the back taxes may not be enjoined, for as appears from the pleadings and the agreed statement of facts, these taxes, if collected, will be collected by suit in which all of the plaintiff's defenses will be available to it. An injunction will not issue to restrain a suit, which has been or is to be brought, on the ground of the invalidity of the claim. Cavanagh vs. Looney, 248 U. S. 453; Boise vs. Boise City, 213 U. S. 276; Northport vs. Hartley, 283 U. S. 568; Champlin Ref. Co. vs. Commr., 286 U. S. 210; Yarnell vs. Hillsborough, 70 Fed. (2d) 435. I do not understand the majority opinion to hold otherwise, or that under their opinion any injunction will be granted as to past transactions. The majority opinion does hold, though, and it is from that holding I dissent, that there is equity in plaintiff's bill for an injunction as to future transactions. This injunction, as I understand the opinion, will restrain the claim and collection of taxes upon all gasoline plaintiff withdraws in future, to directly or indirectly, as described in its bill, and [fol. 207] in the agreed statement of facts, supply government agencies with which it has contracts.

My difference with the majority is fundamental. They think the tax is on the sale. With respect, I submit that it is not. The statute which lays this tax lays it on plaintiff as a storer in the State. It becomes payable by it when the gasoline is withdrawn for ultimate use by the storer, whether that use is to consume it or to part with title and possession of it by sale or otherwise. The Supreme Court of Alabama once,[1] and the Fifth Circuit Court of Appeals twice[2] has so declared. No contrary opinion has been called to my attention.

In the opinion of the majority it is said that Panhandle Oil Co., vs. Knox, 277 U. S. 218, a suit at law for taxes, controls. I do not think so. There the tax was on the sale, not as it is here on the privilege of storing. That case did

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Note 1.—State vs. City of Montgomery 228 Ala. 93, 151 So. 856.

Note 2.—Pan American Petroleum Corporation vs. State of Alabama, 67 Fed. (2d) cert. denied 291 U. S. 670; c/f Standard Oil vs. California U. S. 291, U. S. 243.

not hold, none has yet held, that taxes may not be collected merely because they fall on a person or a thing at some step in the process of getting an article to a governmental market. The contrary is well settled by the decisions of the Supreme Court as collected in Register vs. Commr. 69 Fed (2d) 607. This is made particularly clear in Trinity-farm Construction Co., vs. Grosjean, 291 U. S. 466; Here, as it was there, the taxpayer is an independent dealer. It is not a government instrumentality. The taxpayer here is a general storer of gasoline using the facilities of the State of Alabama to store its gasoline there under the protection of the police power of the State. It ought not to be doubted that in taxing its business as a storer, and in measuring the tax by the withdrawals from storage, the State of Alabama was not intending to, nor does it, tax the operations of an instrument employed by the Government of the Union to carry its powers into operation." To contend [fol. 208] that it does, seems to me to be running the principle of exemption into the ground, and doing so in connection with a tax which in most states, keeps the highway up, assists to run the schools, and generally forms perhaps, the most dependable and most generous source of revenue. I say nothing here of the wisdom or expediency of the tax. I merely note the wide, the universal employment by the State of it.

I admit that the principle of Federal exemption in the Panhandle, 277 U. S. 218, and the Grayburg, 278 U. S. 682, and of State exemption in the Indian Motorcycle case, 283, U. S. 570, was pushed further than I liked to see it pushed. But I do not, in this case, kick against the pricks. I merely insist here that the Supreme Court has made it clear that those cases went to the verge, that the claim of this goes beyond.

But if the majority is right and I am wrong, in regard to the tax as tax, the exemption as exemption, there are other reasons grounded in equitable considerations, why the injunction should not issue.

The plaintiff pleads and proves,[3] indeed, it bases its suit upon pleading and proving that the United States Govern-

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NOTE 3.—"The Company has entered into a contract with the Treasury Department, Procurement Division, Washington, D. C., designated as Contract TPS 6068 Region No.

ment will not buy gasoline from it at a price which takes the tax into consideration and that to obtain the business plaintiff has already bound itself, by contract to supply the gasoline needs of the agencies named at a price which has excluded the tax from consideration. In other words, plaintiff has absorbed the tax and thereby insured the Government at all events, from being burdened by it. Does a storer of gasoline, who in order to obtain government business has so contracted, succeed to the Government's ex- [fol. 210] emption and thereby, by a kind of subrogation, acquire an affirmative equity in advance of sales for a general injunction as to future dealings? An injunction which

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2 under the terms of which the Company is required to make tank car deliveries FOB Mobile, Alabama, to the Quartermaster, United States Army, Fort McClellan, Alabama, and also to make deliveries of gasoline FOB Mobile, Alabama, consigned to the Quartermaster, United States Army, Maxwell Field, Alabama, and also deliveries of gasoline FOB Mobile, Alabama, to Tennessee Valley Authority Wilson Dam, Alabama. This contract covers the requirements that each of these agencies or departments of the United States may require from the period from October 1, 1935, thru December 30, 1935. A copy of this contract is hereto attached marked Exhibit '23' and is made apart hereof.

"The Company has also entered into a contract with the United States Department of the Interior, which contract is designated as No. LS 1959, under the terms of which the Company is required to make deliveries thru retail service [fol. 209] stations to the United States Department of the Interior, the Administrative Division of the Bureau of Reclamation, the Public Works Administration, the Bureau of Indian Affairs, and such other bureaus of the Department of the Interior as may from time to time desire to purchase under said contract, or the requirements which said departments or agencies of the United States may need or desire to purchase in Alabama during the period from October 1, 1935, thru June 30, 1936. A copy of this contract is hereto attached."

The agencies to which plaintiff has been selling are; U. S. Shipping Board; Alabama Transient Bureau; Alabama

supervising, overseeing and auditing all of the transactions which the plaintiff will in future have, will require the court to determine as to each one as it arises, whether and to what extent, the exemption applies? I do not think so. I should not think so if the bill alleged that all of the transactions were to be with agencies exercising admittedly governmental functions. In a controversy of this kind over the imposition and collection of a State tax, valid as to all of the other business the plaintiff does, it seems to me that equity would best stay its hand, and not by injunction

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Relief Administration; U. S. Consular Service; U. S. Marine Hospital No. 13; Mississippi Warrior Service, U. S. Public Health Service; U. S. Veterans Hospital No. 91; U. S. Coast Guard Service; U. S. Naval Service, Pensacola; R. C. T. U. Unit, Alabama Polytechnic Institute; U. S. Engineers Service; U. S. Collector of Customs; U. S. Department of Commerce; U. S. Lighthouse Service; U. S. Observation Squadron; Nitrate Plant No. 2; U. S. Department of the Interior; U. S. War Department; U. S. Department of Agriculture; Finance Officer, Maxwell Field; U. S. Department of Justice; U. S. Navy Department; U. S. Quartermaster, *Maxwell Field; Federal Barge Line;* U. S. Treasury Department; U. S. Post Office Department; U. S. Veterans Administration; Public Works Administration; U. S. Naval Reserve; U. S. Veterans Bureau; U. S. Government, Washington, D. C. Civilian Works Administration; Civilian Conservation Corps; Emergency Conservation Works; Tennessee Valley Authority.

It appears that plaintiff withdraws and delivers its gasoline (a) from bulk plants; (b) from company operated service stations; (c) from consignment service stations; (d) from independent service stations, deliveries being made in tanks and title passing to operator at the time of delivery.

Both the pleadings and the facts show that when representatives of employees of government agencies with whom plaintiff has contracts get gasoline from service stations, they present identification cards showing themselves entitled to purchase such gasoline for the United States or its departments or agencies. When such gasoline is gotten from independent dealers the company replaces such gasoline without cost to them.

undertake to supervise the State's fiscal and taxing relations.

Defendant, citing pertinent Alabama statutes, insists that plaintiff has, within the decision in Matthews vs. Rogers, 284 U. S. 521, Stratton vs. St. L. & S. W. Ry. Co., 284 U. S. 530, an adequate remedy at law to pay the taxes and recover them back if they are due. Plaintiff denies that this is so. But considerations of adequate remedy at law, aside, I think this is a case in which Federal equity jurisdiction ought not to be exerted to interfere in matters involving the fiscal affairs of a State and its subdivisions, because there is lacking here a substantial showing of the existence of a right, and a really threatened and irreparable injury which demand the exercise of that jurisdiction. Pape vs. St. Lucie, 75 Fed. (2d) and cases cited at p. 869. Not that the Federal Court should here determine the validity or invalidity of the exemption claim. "All that the Federal Court should do is to announce that it will stand aloof, having inquired whether anything has happened whereby a Court of equity would be moved to act, it determines that it will not." Atlantic Coast Line vs. Florida, 295 U. S. 315.

No case has been cited, I have found none, where an injunction of this supervising kind has issued. When, as further appears from the pleadings and the agreed statement, the withdrawals which plaintiff seeks to protect from state tax will be for deliveries to government agencies without reference to whether these agencies are or are not, as to the matters they use the gasoline for, engaged in govern- [fol. 211] mental functions, there is an additional reason why a general injunction should not issue.

The agreed statement of facts as set out in Note 3 supra shows the names and to some extent, the nature of the agencies with which plaintiff has contracted for future deliveries, and in regard to which it asks the injunction. Nothing is shown, however, there or elsewhere from which it may be told as to some of these agencies, at least, whether the activities they engage in are in a tax exemption sense, governmental, or whether the uses for which the gasoline is bought will be. It is settled, by South Carolina vs. United States, 199 U. S. 437; Flint vs. Stone Tracy Co., 220 U. S. 107; Ohio vs. Helvering, 292 U. S. 360; Helvering vs. Powers, 293 U. S. 214, that "the state cannot withdraw sources of revenue from the Federal taxing power by engaging in businesses which constitute a departure from the usual govern-

mental functions, and to which, by reason of their nature, the Federal taxing power would normally extend." "The fact that the State has power to undertake such enterprises and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity. The necessary protection of the independence of the State government is not deemed to go so far." Helvering vs. Powers, supra.

What the State may not, neither may the Government, do. If the establishment of departments of liquor control, as in the South Carolina and Ohio cases, and the operation of a railroad, as in Helvering vs. Powers, are not the exercise by the State of ordinary and usual governmental functions within the principle of exemption from Federal taxation, it would seem probable that some of the agencies which plaintiff's gasoline will activate will not be within the principle of exemption from State tax. At any rate, plaintiff actively claiming the exemption as a basis for the injunction, has the burden of showing that they are, and this it has wholly failed to do. Surely in these circumstances, equity should stay its hand from crippling, by a general injunction, the State's taxing power.

I dissent.

[fol. 212] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed Jan. 3, 1936

To the Honorables J. C. Hutcheson, Circuit Judge, and Robert T. Ervin and Charles B. Kennamer, District Judges, Composing the Court Consisting of Three Judges under Section 380 of Title 28 of the United States Code Annotated (Judicial Code Section 266 Amended):

Now come the defendants, Bibb Graves, as Governor of the State of Alabama, Albert A. Carmichael, as Attorney General of the State of Alabama, Henry S. Long, as President of the State Tax Commission of Alabama, and John P. Kohn, Sr., and W. W. Ramsey, as Associate members of the State Tax Commission, of Alabama, and feeling themselves aggrieved by the final decree of the Court entered

on the 7th day of December, 1935 pray an appeal therefrom to the Supreme Court of the United States. The particulars wherein they consider the final decree erroneous are set forth in their assignment of errors on file and to which reference is made.

Wherefore, the premises considered your petitioners pray that an appeal in their behalf to the United States Supreme Court for the correction of the errors complained of and herewith duly assigned be allowed and granted; and that an order be had fixing the amount of bond and security to be given by these defendants as appellants and conditioned as the law directs, and they pray a reversal of said decree.

Albert A. Carmichael, Attorney General of the State of Alabama; Frontis H. Moore, Asst. Attorney [fol. 213] General of the State of Ala.; Peyton Bibb, Spec. Asst. Atty. General of the State of Ala.; Thomas J. Judge, Farley Bldg., Birmingham, Ala.; Richard T. Rives, Montgomery, Ala., Attorneys for Defendants.

[File endorsement omitted.]

[fol. 214] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Jan. 3, 1936.

To the Honorables J. C. Hutcheson, Circuit Judge, and Robert Ervin and Charles B. Kennamer, District Judges, Composing the Court Consisting of Three Judges Under Section 380 of Title 28 of the United States Code Annotated (Judicial Code Section 266 Amended):

Now come the defendants, Bibb Graves, as Governor of the State of Alabama, Albert A. Carmichael, as Attorney General of the State of Alabama, Henry S. Long, as President of the State Tax Commission of Alabama, and John P. Kohn, Sr. and W. W. Ramsey, as Associate Members of the State Tax Commission of Alabama, and in connection with their petition for appeal file the following assignments

of error on which they will rely on their appeal to the Supreme Court of the United States from the final decision of the Three Judge District Court entered the 7th day of December, 1935.

The Three Judge District Court erred

1. In overruling the motion of defendants to dismiss the bill of complaint.

2. In restraining and enjoining the defendants, and each of them, from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of gasoline or other [fol. 215] liquid motor fuels sold, distributed or withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on the Texas Company measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States or withdrawn from storage, and which is sold and delivered to the United States by it or for its account under contracts between it and the United States.

3. In restraining and enjoining the defendants, and each of them, from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of gasoline or other liquid motor fuels withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on The Texas Company measured or determined by the quantity of gasoline or other liquid motor fuels withdrawn from storage, and which is sold and delivered to the United States by it or for its account under contracts between it and the United States.

4. In holding that the excise tax imposed by the statutes of the State of Alabama referred to in the bill of complaint is not a tax on the business of storage, but is only on the withdrawal from storage where such withdrawal is for use other than for sale.

5. In holding that a person engaged in the business of selling gasoline and other liquid motor fuels, and engaged also in one or more of the businesses of distributing and storing or withdrawing from storage such commodities is only required by such statutes as to the gasoline which such person sells to pay a tax measured by the amount of the gasoline sold.

6. In holding that a person engaged in the business of selling gasoline and other liquid motor fuels, and engaged also in one or more of the businesses of distributing and storing or withdrawing from storage such commodities, is not required to pay a tax for the withdrawal from storage [fols. 216-221] of the gasoline which such person sells.

7. In holding that as to gasoline which is sold, the tax is measured exclusively by the number of gallons sold.

8. In holding that the gasoline excise tax acts set forth or referred to in the bill of complaint are unconstitutional and void insofar as they impose an excise tax on account of or with respect to sales of gasoline to the United States measured by the number of gallons sold to the United States.

9. In holding that the necessary effect of the tax measured by the quantity of gasoline withdrawn from storage for sale and delivery to the United States would be to increase the price to the United States for such commodity by the amount of said tax, and that such tax burden would necessarily and directly fall on the United States.

10. In holding that the Constitution of the United States forbids the imposition of an excise tax on account of and with respect to gasoline withdrawn from storage for sale and delivery to the United States measured by the number of gallons so withdrawn from storage.

11. In holding that the plaintiff has no adequate remedy at law in the premises.

12. In not dismissing the plaintiff's bill of complaint.

Albert A. Carmichael, Attorney General of the State of Alabama; Frontis H. Moore, Asst. Attorney General of the State of Ala.; Peyton Bibb, Spec. Asst. Atty. General of the State of Ala.; Thomas J. Judge, Farley Bldg., Birmingham, Ala.; Richard T. Rives, Montgomery, Alabama, Attorneys for Defendants.

[File endorsement omitted.]

[fols. 222-224] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed Jan. 3, 1936.

It appearing to the Court in the cause stated that the defendants, Bibb Graves, as Governor of the State of Alabama, Albert A. Carmichael, as Attorney General of the State of Alabama, Henry S. Long, as President of the State Tax Commission of Alabama, and John P. Kohn, Sr., and W. W. Ramsey, as Associate Members of the State Tax Commission of Alabama, have filed their petition for appeal to the Supreme Court of the United States, and have filed therewith their assignment of errors, and also their statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the Supreme Court rules duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question.

It is hereby ordered by the Court that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the decree rendered in said cause on the 7th day of December, 1935, and that said defendants give a bond with good and sufficient security in the sum of One Thousand Dollars ($1,000.00) that they as appellants shall prosecute their appeal to

effect, and answer all damages and costs if they fail to make their appeal good.

Dated this 3rd day of January, 1936.

J. C. Hutcheson, Circuit Judge. Robert T. Ervin, District Judge. Charles B. Kennamer, District Judge.

[File endorsement omitted.]

[fols. 225 & 226] Bond on Appeal for $1,000,00 approved and filed Jan. 3, 1936, omitted in printing.

[fols. 227 & 228] Citation in usual form, showing service on John S. Coleman et al., filed Jan. 3, 1936, omitted in printing.

[fol. 229] In United States District Court

[Title omitted]

Notice of Appeal—Filed Jan. 3, 1936

To the Texas Company, a Corporation, Plaintiff-Appellee:

The plaintiff in the above entitled case is hereby notified that the defendants appealed from the decree of the Court as rendered on the 7th day of December, 1935 and that said appeal will be to the Supreme Court of the United States in accordance with the citation as issued in this case.

Albert A. Carmichael, Attorney General of the State of Alabama; Frontis H. Moore, Asst. Atty. General of the State of Alabama; Peyton Bibb, Spec. Asst. Atty. General of the State of Ala.; Thomas J. Judge, Farley Bldg., Birmingham, Ala.; Richard T. Rives, Montgomery, Alabama., Attorneys for Defendants.

Service of the above notice of appeal accepted this 3rd day of January, 1936.

John S. Coleman, Birmingham, Alabama; Bradley, Baldwin, All & White, Birmingham, Ala., Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 230] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed Jan. 3, 1936

It is hereby stipulated and agreed by and between the parties hereto that for the purposes of the appeal which has been allowed herein to the Supreme Court of the United States, the Clerk is requested to prepare and forward to the Clerk of the Supreme Court of the United States a transcript of record on appeal which shall include only the following proceedings:

1. The original bill of complaint and application for interlocutory and final injunction filed herein on the 24th day of September, 1935.

2. The motion to dismiss the plaintiff's bill of complaint filed herein on the 12th day of October, 1935.

3. The order setting the application for an interlocutory injunction down for hearing before the Honorable Joseph C. Hutcheson, Circuit Judge, the Honorable Robert T. Ervin, District Judge, and the Honorable Charles B. Kennamer, District Judge filed herein on the 12th day of October, 1935.

4. The notice of the hearing on motion for interlocutory injunction to the Honorable Bibb Graves, as Governor of the State of Alabama, and to the defendants, together with the return of service of said motion returned and filed herein on the 17th day of October, 1935.

5. The answer of the defendants filed herein on the 23rd day of October, 1935.

6. The amendment to the bill of complaint making as party defendant thereto Honorable Bibb Graves, as Gov-
[fol. 231] ernor of the State of Alabama, and the acceptance of service of such amendment and stipulation therein included filed herein on the 24th day of October, 1935.

7. The appearance and joinder of Honorable Bibb Graves, as Governor of the State of Alabama, as a party defendant in the motion to dismiss the bill of complaint, and the answer filed on behalf of the other defendants, the same being filed herein on the 2nd day of November, 1935.

8. The stipulation and agreement between the plaintiff and the defendants that without waiving the plaintiff's insistence on its application for the interlocutory injunction this cause might also be submitted for final decree, the same being filed herein on the 2nd day of November, 1935.

9. The statement of the evidence and the evidence therein referred to under Equity Rule 75 stipulated and agreed to between the plaintiff and defendants, and the order approving the same, the same being filed herein on the 3rd day of January, 1936.

10. The findings of fact and conclusions of law filed by the Court herein on the 7th day of December, 1935.

11. The final decree filed by the Court herein on the 7th day of December, 1935.

12. Acceptance of service of the writ of injunction and stipulation relative thereto.

13. The opinion by Judge Robert T. Ervin, concurred in by Judge C. B. Kennamer filed herein on the 7th day of December, 1935.

14. The dissenting opinion by Judge J. C. Hutcheson filed herein on the 7th day of December, 1935.

15. The petition for appeal filed herein on the 3rd day of January, 1936.

16. The assignment of errors accompanying the petition for appeal filed herein on the 3rd day of January, 1936.

17. The statement as to the jurisdiction of the Supreme Court of the United States.

18. The order allowing the appeal and fixing the bond filed herein on the 3rd day of January, 1936.

19. Service of appeal papers and acceptance of service thereof.

[fol. 232] 20. The appeal bond and the approval of the same filed herein on the 3rd day of January, 1936.

21. The citation on appeal and acceptance of service of the same filed herein on the 3rd day of January, 1936.

22. The notice of appeal and acceptance of service of the same filed herein on the 3rd day of January, 1936.

23. This præcipe and the order approving the same filed herein on the 3rd day of January, 1936.

This the 3rd day of January, 1936.

Albert A. Carmichael, Attorney General of the State of Alabama; Frontis H. Moore, Asst. Atty. General of the State of Alabama; Peyton Bibb, Spec.

Asst. Atty. General of the State of Alabama; Thomas J. Judge, Farley Bldg., Birmingham, Ala.; Richard T. Rives, Montgomery, Alabama, Attorneys for Defendants. John S. Coleman, Birmingham, Alabama; Bradley, Baldwin, All & White, Birmingham, Ala., Attorneys for Plaintiff.

Counsel for Appellants, defendants, having submitted the foregoing præcipe, and the same having been approved and stipulated by counsel for appellee, plaintiff, the said præcipe is hereby approved and it is ordered that the Clerk transmit the original narrative of proceedings herein specified to the Clerk of the Supreme Court of the United States for the purposes of the appeal in the said cause.

This the 3rd day of January, 1936.

J. C. Hutcheson, Circuit Judge. Robert T. Ervin, [fol. 233] District Judge. Charles B. Kennamer, District Judge.

[fol. 234] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 235] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS ON WHICH APPELLANTS INTEND TO RELY AND OF THE PARTS OF THE RECORD WHICH APPELLANTS THINK NECESSARY FOR THE CONSIDERATION THEREOF —Filed Jan. 29, 1936

The appellants intend to rely upon the contentions that the specially constituted District Court erred:

1. In overruling the motion of defendants to dismiss the bill of complaint.

2. In restraining and enjoining the defendants, and each of them, from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is

measured or determined by the number of gallons of gasoline or other liquid motor fuels sold, distributed or withdrawn from storage in said State — such persons or other parties insofar as said statutes levy or impose excise taxes on the Texas Company measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States or withdrawn from storage, and which is sold and delivered to the United States by it or for its account under contracts between it and the United States.

[fol. 236] 3. In restraining and enjoining the defendants, and each of them, from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of gasoline or other liquid motor fuels withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on The Texas Company measured or determined by the quantity of gasoline or other liquid motor fuels withdrawn from storage, and which is sold and delivered to the United States by it or for its account under contracts between it and the United States.

4. In holding that the excise tax imposed by the statutes of the State of Alabama referred to in the bill of complaint is not a tax on the business of storage, but is only on the withdrawal from storage where such withdrawal is for use other than for sale.

5. In holding that a person engaged in the business of selling gasoline and other liquid motor fuels, and engaged also in one or more of the businesses of distributing and storing or withdrawing from storage such commodities is only required by such statutes as to the gasoline which such person sells to pay a tax measured by the amount of the gasoline sold.

6. In holding that a person engaged in the business of selling gasoline and other liquid motor fuels, and engaged also in one or more of the businesses of distributing and

storing or withdrawing from storage such commodities, is not required to pay a tax for the withdrawal from storage of the gasoline which such person sells.

7. The holding that as to gasoline which is sold, the tax is measured exclusively by the number of gallons sold.

8. In holding that the gasoline excise tax acts set forth or referred to in the bill of complaint are unconstitutional and void insofar as they impose an excise tax on account of or with respect to sales of gasoline to the United States measured by the number of gallons sold to the United States.

[fol. 237] 9. In holding that the necessary effect of the tax measured by the quantity of gasoline withdrawn from storage for sale and delivery to the United States would be to increase the price to the United States for such commodity by the amount of said tax, and that such tax burden would necessarily and directly fall on the United States.

10. In holding that the Constitution of the United States forbids the imposition of an excise tax on account of and with respect to gasoline withdrawn from storage for sale and delivery to the United States measured by the number of gallons so withdrawn from storage.

11. In holding that the plaintiff has no adequate remedy at law in the premises.

12. In not dismissing the plaintiff's bill of complaint.

The appellants deemed the entire record as filed to be necessary for the consideration of the contentions above enumerated.

Albert A. Carmichael, Attorney General of the State of Alabama; Frontis H. Moore, Asst. Atty. General of the State of Ala.; Peyton D. Bibb, Spec. Asst. Atty. General of the State of Ala.; Thomas J. Judge, Farley Bldg., Birmingham, Ala.; Richard T. Rives, Montgomery, Ala., Attorneys for Appellants.

Service of a copy of the foregoing statement of points is hereby acknowledged on behalf of the appellee, this 25th day of January, 1936.

John S. Coleman, Birmingham, Ala.; Bradley, Baldwin, All & White, Birmingham, Ala., Attorneys for Appellee.

[fols. 238-240] [File endorsement omitted.]

Endorsed on cover: File No. 40,281. M. Alabama, D. C. U. S. Term No. 727. Bibb Graves, as Governor of the State of Alabama, et al., etc., appellants, vs. The Texas Company. Filed January 29, 1936. Term No. 727, O. T., 1935.

FILE COPY

JAN 29 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 727

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL., ETC.,

Appellants,

vs.

THE TEXAS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

STATEMENT AS TO JURISDICTION.

ALBERT A. CARMICHAEL,
Attorney General of Alabama:
FRONTIS H. MOORE,
PEYTON BIBB,
THOMAS J. JUDGE,
RICHARD T. RIVES,
Counsel for Appellants.

INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Statutory provisions relied upon, date of decree sought to be reviewed and date upon which application for appeal was presented	2
State statute the validity of which is involved	2
Nature of the case and rulings below	2
Cases believed to sustain the jurisdiction	7

TABLE OF CASES CITED.

Brucker v. Fisher, 49 F. (2d) 759	7
Panhandle Oil Company v. State of Mississippi, ex rel. Knox, Attorney General, 277 U. S. 218	4
Stratton v. St. Louis S. W. Ry. Co., 282 U. S. 10, 51 Sup. Ct. Rep. 8, 75 L. Ed. 135	7
T. L. Smith et al. v. Wilson et al., 273 U. S. 388	7
Wheeler Lumber, Bridge & Supply Company v. United States, 281 U. S. 572	5

STATUTES CITED.

Act of the Legislature of Alabama approved January 31, 1935	..
General Acts of Alabama of 1923, page 36, as amended by General Acts of Alabama of 1927, page 326, as further amended by General Acts of Alabama of 1931, page 458	2
General Acts of Alabama of 1927, page 16	2
General Acts of Alabama of 1931, page 859	2
General Acts of Alabama of 1932, page 314	2
General Revenue Acts of Alabama approved July 10, 1935, as Section 348, Schedules 156 to 156.20	2
Schedule 156	2
Schedule 156.1	3
Schedule 156.2	3
Judicial Code, Sections 238 and 266, as amended by the Act of February 13, 1925, c. 229, section 1 (42 Stat. 938), (28 U. S. C. A., Secs. 345 and 380)	2, 7

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA

No. 662

THE TEXAS COMPANY, A CORPORATION,
Plaintiff,

vs.

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ALBERT A. CARMICHAEL, AS ATTORNEY GENERAL OF THE STATE OF ALABAMA, HENRY S. LONG, AS PRESIDENT OF THE STATE TAX COMMISSION OF ALABAMA, AND JOHN P. KOHN, SR., AND W. W. RAMSEY, AS ASSOCIATE MEMBERS OF THE STATE TAX COMMISSION OF ALABAMA,
Defendants.

BEFORE THE HONORABLES J. C. HUTCHESON, CIRCUIT JUDGE, AND ROBERT T. ERVIN AND CHARLES B. KENNAMER, DISTRICT JUDGES, COMPOSING THE COURT CONSISTING OF THREE JUDGES UNDER SECTION 380 OF TITLE 28 OF THE UNITED STATES CODE ANNOTATED (JUDICIAL CODE SECTION 266 AMENDED).

STATEMENT AS TO JURISDICTION.

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Sections 238 and 266

of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1 (42 Stat. 938) (28 U. S. C. A., Secs. 345 and 380). The final decree of the Three-Judge District Court was entered December 7th, 1935. Application for appeal is herewith presented on the 3rd day of January, 1936.

The statutes of the State of Alabama, the validity of which is involved, are the gasoline excise tax acts: General Acts of Alabama of 1923, page 36 as amended by General Acts of Alabama of 1927, page 326, as further amended by General Acts of Alabama of 1931, page 458; also General Acts of Alabama of 1927, page 16; also General Acts of Alabama of 1931, page 859; also General Acts of Alabama of 1932, page 314, also an Act of the Legislature of Alabama approved January 31st, 1935, not yet printed in official bound edition; all of which said gasoline excise tax acts are consolidated in the General Revenue Acts of Alabama approved July 10th, 1935, as Section 348, Schedules 156 to 156.20, inclusive, thereof, also not yet printed in official bound edition but reading in pertinent part as follows:

> "Schedule 156. As used in this Chapter, the term 'Gasoline' shall include gasoline, naphtha, and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines; provided, however, that nothing in this Chapter shall be held to apply to those products known commercially as 'kerosene oil,' 'fuel oil' or 'crude oil' commonly used for lighting, heating or industrial purposes. The word 'person' means and includes persons, corporations, co-partnerships, companies, counties, municipal corporations, school boards, or agencies of the State, or other agencies, associations, incorporated or otherwise singular or plural. The term 'distributor' shall include any person who engages in the selling of gasoline in this State by wholesale domestic trade, but shall not apply to any transaction of such distributor

in interstate commerce. The word 'refiner' shall include any person who manufactures, distills, blends, compounds or mixes any one or more products in the production of a liquid motor fuel as herein defined. The term 'retail dealer' shall include any person herein defined as distributor who is also engaged in the selling of gasoline in this State at any place in this State in broken quantities. The term 'storer' as herein used shall include any person who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same for any purpose.

"Schedule 156.1. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline as herein defined, provided, however, that this excise tax shall not be levied on the sale of gasoline in interstate commerce, and provided further, that where the excise tax of six cents ($0.06) per gallon upon the sale, distribution, storage or withdrawal from storage of such gasoline shall have been paid by a distributor, refiner, or by retail dealer or storer, such payment shall be sufficient, the intention being that the tax shall be paid but once.

"Schedule 156.2. The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided that 'sellers' of gasoline and its substitute paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

The plaintiff, The Texas Company, a corporation, engaged in business in the State of Alabama as a storer,

distributor and retail dealer of gasoline, filed its bill of complaint against the defendants who are the officials of the State of Alabama charged with the administration and enforcement of the said gasoline excise tax acts, and made application for an interlocutory injunction suspending and restraining the enforcement, operation or execution of said gasoline excise tax acts by restraining the actions of the defendants and each of them from the enforcement or execution of said acts insofar as said acts levy or impose excise taxes on plaintiff for selling gasoline or other liquid motor fuels in the State of Alabama to the United States, or for withdrawing from storage in Alabama such commodities for the purpose of selling same to the United States. The Bill further prayed that upon the final hearing a permanent injunction of like effect be issued and granted against the defendants.

The application for an interlocutory injunction, as well as the prayer for a permanent injunction was based upon the ground of the alleged unconstitutionality of the said gasoline excise tax statutes of the State of Alabama. The plaintiff in its bill of complaint referred to the decision of the Supreme Court of the United States in *Panhandle Oil Company* v. *State of Mississippi ex rel. Knox, Attorney General*, 277 U. S. 218, and on that authority claimed that the said excise tax was a tax on the United States contrary to the Constitution of the United States. The admitted facts showed that the plaintiff was engaged in the business of a "storer" of gasoline in the State of Alabama. The defendants by their answer and on the trial insisted that the tax was imposed on the plaintiff as a storer of gasoline, and that the plaintiff's purpose in storing such gasoline and withdrawing the same from storage was immaterial as affecting its liability for the taxes levied by said gasoline excise tax acts, and that said acts were not unconstitutional, and were not controlled by the decision

in *Panhandle Oil Company* v. *State of Mississippi ex rel. Knox, Attorney General, supra,* but that that case clearly had no application for reasons analogous to those stated in *Wheeler Lumber, Bridge & Supply Company* v. *United States,* 281 U. S. 572, that in the present case the tax was not laid on the sale, nor because of the sale, but was laid on the storage measured by the withdrawals from storage, and that the storage was not part of the sale but preliminary to it and wholly the plaintiff vendor's affair.

There were other collateral issues involved in the suit not necessary to be stated as a basis for the jurisdiction of the Supreme Court of the United States.

The application for the interlocutory injunction was presented to the Honorable Charles B. Kennamer, the Judge of the District Court of the United States for the Middle District of Alabama, who called to his assistance to hear and determine the application of plaintiff for an interlocutory injunction in the premises, two other Judges as required by Judicial Code Section 266, as amended by the Act of February 13th, 1925, c. 229, Section 1 (28 U. S. C. A., Sec. 380) viz: the Honorable Joseph C. Hutcheson, Judge of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, and the Honorable Robert T. Ervin, Judge of the District Court of the United States for the Southern District of Alabama.

The cause was submitted on the plaintiff's application for an interlocutory injunction as prayed in its bill of complaint, and other pleadings filed in said cause upon an agreed statement of facts and certain additional evidence introduced by each of the parties. Without the plaintiff in any way waiving its insistence on its application for interlocutory injunction, the cause was also submitted for final decree upon the pleadings and upon the same agreed statement of facts and additional evidence introduced upon

the hearing of plaintiff's application for an interlocutory injunction.

Upon final decree the Three-Judge District Court by a divided opinion, Circuit Judge Hutcheson dissenting and filing his dissenting opinion in writing, held that the said gasoline excise tax acts of Alabama were unconstitutional and void in so far as they imposed an excise tax on account of, or with respect to either sales or withdrawals from storage for sale of gasoline to the United States and decreed as follows:

1. That the motion of the defendants to dismiss the bill of complaint be overruled.

2. That the defendants and each of them be restrained and enjoined from taking any steps or instituting any legal proceedings, civil or criminal, to exercise or enforce the provisions of the statute of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuel where the amount of such tax is measured or determined by the number of gallons of gasoline or other liquid motor fuel sold, distributed or withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on the Texas Company measured or determined by the quantity of gasoline or other liquid motor fuel sold to the United States or withdrawn from storage, and which is sold or delivered to the United States by it or for its account under contracts between it and the United States.

3. That the defendants be taxed with the costs.

The plaintiff pressed its application for an interlocutory injunction, but as final decree was being entered in the cause, the Court found it unnecessary to grant or act

separately on plaintiff's application for an interlocutory injunction.

The appeal prayed for is to the Supreme Court of the United States from the final decree granting a permanent injunction, and is provided for by Judicial Code, Section 266, as amended by the Act of February 13, 1925, c. 229, Section 1 (42 Stat. 938 (28 U. S. C. A., Sec. 380)).

Cases believed to sustain the jurisdiction of the United States Supreme Court are:

T. L. Smith et al. v. *Wilson et al.*, 273 U. S. 388.

Stratton v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 135.

Brucker v. *Fisher*, 49 F. (2d) 759.

Respectfully submitted,

ALBERT A. CARMICHAEL,
Attorney General of the State of Alabama;
FRONTIS H. MOORE,
Asst. Atty. General of the State of Alabama;
PEYTON BIBB,
Spec. Asst. Atty. General of the State of Alabama;
THOMAS J. JUDGE,
Farley Bldg., Birmingham, Ala.;
RICHARD T. RIVES,
Montgomery, Alabama,
Attorneys for Defendants.

FILE COPY

Office Supreme Court, U. S.
FILED
MAR 18 1936
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1935

—o—

No. 727

—o—

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL, ETC.,
APPELLANTS,

V.

THE TEXAS COMPANY,
APPELLEE.

—o—

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

—o—

BRIEF FOR APELLANTS.

—o—

ALBERT A. CARMICHAEL,
Attorney General of Alabama,
FRONTIS. H. MOORE,
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THOMAS J. JUDGE AND
RICHARD T. RIVES,
Counsel For Appellants.

INDEX

SUBJECT INDEX

		Page
a.	Reference to report of opinions	1
b.	Reference to statement of jurisdiction	2
c.	Statement of the case	2
d.	Specification of errors intended to be urged	15
e.	Summary of the argument	18
f.	Argument	19
	(1) Jurisdiction of the trial Court— As to past transactions As to future transactions	19
	(2) Meaning and construction of the gasoline excise tax act of Alabama as applied to appellee, The Texas Company	33
	(3) Constitutionality of said Act as applied to appellee, The Texas Company	64

STATUTES CITED

General Acts of Alabama of 1923, page 36, as amended by General Acts of Alabama 1927, page 326, as further amended by General Acts of Alabama of 1931, page 458, (Acts of the Legislature of Alabama approved Jan. 31, 1935)	34
General Acts of Alabama of 1927, page 16,	34
General Acts of Alabama of 1927, page 635	24
General Acts of Alabama of 1931, page 859,	34
General Acts of Alabama of 1931, page 527,	26
General Acts of Alabama of 1932, page 314,	34
General Acts of Alabama of 1935, page 508	34
(General Revenue Acts of Alabama approved July 10, 1935, as Section 348, Schedules 156 to 156.20)	36

Page

General Acts of Alabama of 1935, page 294, Section 78,..... 28
General Acts of Alabama of 1935, page 307, Section 103,..... 28
General Acts of Alabama of 1935, page 568, Section 379,..... 28
Judicial Code, Sections 238 and 266, as amended by the Act of February 13, 1925, c. 229, section 1 (42 Stat. 938), (28 U.S.C.A., Secs. 345 and 380)..... 2
Judicial Code, Section 267, U. S. C. A. Title 28, Section 384,..... 23

TABLE OF CASES CITED

Adams, Tax Collector, vs. Southern Railway Co., 176 Ala., page 320, 58 So. 397..... 24
Alabama Gold Life Insurance Co. v. Lott, Tax Collector, 54 Ala. 499..... 23
Allred v. Dunn, Tax Collector, 207 Ala. 469, 93 So. 390..... 24
American Airways v. Wallace 57 Fed. (2d) 877, 47
American Mfg. Co. v. City of St. Louis, 250 U. S. 459, 39 Sup. Ct. Rep. 522..... 53
Boise v. Boise City, 213 U. S. 276..... 22
Bower, Tax Collector, v. American L. & Express Co., 195 Ala. 572, 71 So. 100..... 24
Cavanagh v. Looney, 248 U. S. page 453..... 22
Champlin Mfg. Co. v. Commission, 286 U. S., 210 22
City of Gadsden v. American National Bank, 225 Ala. 490, 144 So. 93..... 24
Coleman v. Eutaw, 157 Ala. 327, 47 So. 703..... 60
Dawson v. Ky. Distilling Co., 255 U. S. 288, 65 L. ed. 638..... 40
3rd Decennial Digest, Courts, Section 366-1..... 54

Page

2nd Decennial Digest, Courts, Section 366-1 54
Detroit & M. Railway Co. v. Fletcher Paper Co., 248 U. S. 30, 39 Sup. Ct. Rep. affirming Fletcher Paper Co. v. Detroit & M. Railway Co., 198 Mich. 469 53
Edelman v. Boeing Air Transport, 289 U. S. 249, 53 Sup. Ct. Rep. 591, 77 L. ed. 1155 50
Educational Films Corp. v. Ward, 282 U. S. 379, 387, 75 L. ed. 400, 404 65
Ervin & Stevens, Receivers, etc. v. State of Ala. (Ms.) decided November 22, 1935 45
Foster & Creighton Co. v. Graham, 154 Tenn. 412, 285 S. W. 570, 47 A. L. R. 976 66
Helvering v. Powers, 293 U. S. 214 33
High on Injunctions, Vol. 1, 4th Ed., Section 491, page 456 21
High on Injunctions, Vol. 1, 4th Ed., Section 23, page 38 21
Indian Motorcycle Co. v. U. S. 283 U. S. 570, 75 L. ed. 1277 67
Jefferson County v. Hard, 227 Ala. 201, 149 So. 81 31
Kansas City, Memphis & Birmingham Ry. Co. v. Stiles, 37 Sup. Ct. Rep. 48 54
Mathews v. Rogers, 284 U. S. 521 32
North Carolina & St. L. Railway v. Wallace, 288 U. S. 249, 53 Sup. Ct. Rep. 345 45
Northport v. Hartley, 283 U. S. 568 22
Nutt v. Ellerbe, 56 Fed. (2d) 1059 28
Oates v. Whitehead, Tax Collector, 173 Ala. 209 55 So. 803 24
Ohio v. Helvering, 292 U. S. 360 32
Orange State Oil Co. v. Amos, 100 Fla. 884, 130 So. 707 41

Page

Pan-American Petroleum Corp. v. State of Ala. 67 Fed. (2d) 590, Certiorari denied, 291 U.S. 670 63
Panhandle Oil Co. v. State of Miss. ex rel. Knox, 277 U. S. 218, 48 Sup. Ct. Rep. 451, 72 L. ed. 857 65
Patterson v. Pitts, Tax Collector, 180 Ala. 100, 60 So. 390 24
Scottish Union & National Insurance Co. v. Bowland, 196 U. S. 611 22
South Carolina v. United States, 199 U. S. 437 32
Standard Oil Co. of California v. California, 291 U. S. 242, 59 C. J. 1079, Section 635 55
State v. City of Montgomery, 228 Ala. 93, 151 So. 856 63
State v. Tuscaloosa Building & Loan Assn., 161 So. 530, 534 64
Stewart, Clerk, v. Wilson Printing Co., 210 Ala. 624, 99 So. 92 63
Stratton v. St. L. & S. F. R. Co., 284 U. S. 530 32
Supreme Lodge Knights of Pythias v. Meyer, 265 U. S. 30, 44 Sup. Ct. Rep. 432 54
Trinity Farm Constr. Co. v. Grosjean, 291 U. S. 466, 78 L. ed. 918 70
United States v. Butler, 80 L. ed. 287 33
United States v. Healey, 160 U. S. 136, 60 Sup. Ct. Rep. 16, 40 L. ed. 369 63
Ward, Tax Collector, v. First National Bank of Hartford, 142 So. 93 24
Wheeler Lumber B. & S. Co. v. U. S. 281 U. S. 572, 74 L. ed. 1047 69
Woco Pep Co. of Montgomery v. City of Montgomery (Ala.) 121 So. 64 69
Yarnell v. Hillsborough, 70 Fed. (2d) 435 22

Supreme Court of the United States

OCTOBER TERM, 1935

No. 727

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL, ETC.,
APPELLANTS,

V.

THE TEXAS COMPANY,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF

a. The opinions delivered in the Court below have not yet been published. The majority opinion of District Judge Ervin concurred in by District Judge Kennamer appears on pages 226 *et seq.* of the printed record. The dissenting opinion of Circuit Judge Hutcheson appears on pages 233 *et. seq.* of the printed record.

b. Paragraph 1 of Rule 12 of the Supreme Court has been complied with, and the statement made thereunder is referred to for a concise statement of the grounds on which the jurisdiction of this Court is invoked.

c. STATEMENT OF THE CASE

A. The Decree to be Reviewed.

This appeal is from the final decree of a special District Court consisting of three judges under Section 380 of Title 28 of the United States Code Annotated (Judicial Code Section 266 Amended). That final decree restrained and enjoined the defendant officers (appellants here) (R. 224), from taking any steps or instituting any legal proceedings, civil or criminal to execute or enforce the provisions of the statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of the gasoline or other liquid motor fuels sold, distributed or withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on The Texas Company, measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States or withdrawn from storage and which is sold and delivered to the United States by it or for its account under contracts between it and the United States.

The material facts are not in dispute and are covered by a written agreed statement of facts (R. 110 *et. seq.*) In addition a few affidavits were introduced by each of the parties. (*R.* 95 *et. seq.*)

B. THE PARTIES

Appellee, The Texas Company, carries on and transacts as its principal business in the State of Alabama the storing and marketing of gasoline, kerosene, lubricating oils and other petroleum products. It has large investments in property and equipment in each of the sixty-seven (67) Counties in the State.

Appellants are the officials of the State of Alabama charged with the administration and enforcement of the gasoline excise tax statutes of said State.

C. THE CONTROVERSY

The Attorney General of Alabama on July 5th, 1935 rendered an official opinion to the President of the State Tax Commission, a copy of which is attached as Exhibit "H" to the Bill of Complaint (R. 59) and the effect of which is succinctly stated as a caption of said opinion:

> "The aggregate tax imposed by the several gasoline excise tax statutes is a privilege tax upon the storage, and consequent withdrawal from storage, of gasoline which tax accrues upon amount at the time of withdrawal from storage, and it is the mandatory duty of refiners, storers and distributors to compute and pay the tax as applicable to them on the basis of their withdrawals from storage. In com-

puting and paying the several amounts of tax due by them, distributors, refiners, retail dealers, and storers are not entitled to deduct from the basis of computation a number of gallons equal to the number of gallons of gasoline withdrawn from storage by them and sold to the United States Government in Alabama."

It was admitted that (R. 112) the officials representing the State Tax Commission, before the institution of this suit, informed the agents or attorneys of the Company that if the taxes imposed by the Alabama Gasoline Excise Tax Acts were not paid with respect to all gasoline withdrawn from storage in the State of Alabama and sold in said State to the U[illegible]tates, or to its departments or agencies, duri[illegible]g a period of the preceding five (5) years, that a suit or suits would be instituted to recover same; and further that (R. 113) the defendants, in their respective official capacities with the State of Alabama, intend to immediately follow the ruling of the Attorney General of Alabama dated July 5, 1935, and attached to the Bill of Complaint as Exhibit "H" and to collect or attempt to collect from those parties withdrawing from storage in Alabama gasoline and other liquid motor fuels and selling same to the United States, or its said departments or agencies, the taxes held under said opinion to be imposed on said parties on account of said transactions, unless said defendants are enjoined or restrained from doing so by judicial order or decree.

D. APPELLEE'S BUSINESS AND THE MANNER IN WHICH IT IS CONDUCTED.

For convenience we shall refer to appellee as the Company.

The largest single commodity dealt in by the Company in said state is gasoline, which is handled in the manner hereinafter stated (R. 111, 113 et seq).

The Company has never manufactured or refined any gasoline within the State of Alabama, and since prior to January 1, 1930 all of the gasoline which it has sold or withdrawn from storage in said State was manufactured or refined at its refinery located at Port Arthur, Texas, and then shipped by the Company in its boats or barges to its Terminals located either in the City of Mobile, Ala., or in the City of Pensacola, Florida, or in the Town of Millville, Florida. These terminals are located at or near the docks, and consist of storage tanks and other facilities for the direct unloading and reception of the gasoline as it comes to the Company's boats or barges from said refinery. After the gasoline is received at the terminals, it is shipped either by railroad in tank cars, or in boats to the bulk storage plants of the Company, or to the customers of the Company located principally in the States of Alabama, Florida, Georgia, Louisiana and Tennessee, except that the gasoline which is deposited or stored in the bulk storage plant of the Company located at Mobile, Alabama is transported by means of pipe lines connecting said terminal at Mobile with said Mobile bulk storage plant. The Company has now and has had during the past five (5) years thirty-six (36) bulk storage plants located in Alabama, which consist of

storage tanks and other facilities for keeping or storing the gasoline which is to be sold and distributed either through retail service stations or direct to its customers.

Since prior to January 1, 1930 Company has either owned, operated or has been interested in the operation of service stations at which gasoline is sold at retail to the public within the State of Alabama as follows:

A—*Company Operated Service Stations*, which are stations either owned or leased to the Company and are operated by salaried employees of the Company; the title to the gasoline handled through such stations remains in the Company until it is sold and delivered at retail to the Company's customers.

B—*Consignment Service Stations*, which are stations originally owned or leased to the Company and later leased or sub-leased by Company to individual operators. These stations are operated under contracts entered into between the Company and the operator of such stations, under the terms of which contracts all of the gasoline which is delivered by the Company into the tanks or other containers located on the premises of said stations, is owned by the Company until such gasoline is sold at retail to the customers who purchase same. The owners or operators of the Consignment Service Stations never acquire any interest in or title to said gasoline, but the title passes direct from the Company to the retail customer. Each owner or operator of such station is paid by the Company a commission on each gallon of gasoline of the Company sold or delivered through the station at which he is located.

C—*Independent Dealer Service Stations* are stations to which the Company makes deliveries of gasoline into the tanks or containers located on the premises of such station and the title to such gasoline at the time of such delivery passes from the Company to the owner or operator of such station and the owner or operator then sells and delivers the gasoline at retail to the public.

All of the three (3) classes of service stations above described consist of underground storage tanks and pumps connected therewith and other facilities for the storage and selling of gasoline at retail to the public. All of the gasoline which is deposited in the tanks or other containers is first withdrawn from bulk storage plant stations of the Company and transported by means of tank trucks or tank wagons from such bulk storage plants and delivered into the tanks or containers located on the retail service station premises.

During the period from January 1, 1930 through September 22, 1935 the Company withdrew from storage in Alabama and sold and delivered in said State to the United States, or its departments or agencies, 286,639.36 (Two Hundred Eighty-six Thousand Six Hundred Thirty-nine and Thirty six One hundredths) gallons of gasoline. The deliveries made, respectively from the terminal of the Company at Mobile, Alabama, from Company Bulk Staton Plants located in Alabama, from Company Operated Service Stations, from Company Consignment Service Stations and from Independent Dealer Service Stations were as follows:

Mobile Terminal	Bulk Station Plants	Company Operated Service Stations	Consignment Service Stations	Independent Dealer Service Stations
76221	174684	1240	13328	21166.36

A detailed schedule showing the amount of gasoline withdrawn from storage by the Company in Alabama and delivered in Alabama to the United States, or to its departments or agencies, during each calendar year from January 1, 1930 through September 22, 1935 appears as Exhibit "2" to the agreed statement of facts (R. 116, 128).

The gasoline delivered from the Terminal of the Company at Mobile, Alabama, amounting to Seventy-six Thousand Two Hundred Twenty-one (76,221) gallons was delivered F.O.B. railroad cars at Mobile, Alabama, consigned to the United States Army, Quartermaster Corps, Fort McClellan, Alabama. All of this gasoline had previously been shipped in boats or barges from Port Arthur, Texas to the Mobile Terminal and there deposited or stored in the tanks or containers of the Company at such terminal where it remained until it was withdrawn from storage into tank railroad cars on railroad tracks adjacent to said terminal. The title to said gasoline passed from the Company to the United States Army at the time it was loaded in said railroad tank cars at Mobile, Alabama. The sale and delivery of this gasoline to the United States Army was made under a previous contract which the Company had with the United States.

The One Hundred Seventy-four Thousand Six Hundred Eighty-four (174,684) gallons of gasoline above described as delivered from Bulk Plants in Alabama to the United States, or to the various depart-

ments or agencies of the United States, was gasoline which had been originally shipped from the Company's refinery at Port Arthur, Texas in boats or barges of the Company to the Company's Terminals located at either Mobile, Alabama; Pensacola, Florida; or Millville, Florida. After the gasoline arrived at these terminals it was loaded in railroad tank cars and shipped by railroad direct to the bulk stations in Alabama where it was unloaded and placed in tanks or containers in such bulk stations, except that the gasoline which was delivered from the Mobile Terminal to the Mobile Bulk Plant was transported by means of the aforesaid pipe lines. After the gasoline was delivered and stored in the Company's Bulk Plants in Alabama, it was not withdrawn from storage until placed in the Company's trucks or tank wagons, or in steel barrel containers, and delivered direct to the United States, or its departments or agencies, and the sole purpose of withdrawing such gasoline from the tanks or containers located in the Company's Bulk Plants was to make deliveries of such gasoline to the United States, or its said departments or agencies, under contracts which had previously been entered into between the Company and the United States, or its departments or agencies. In some instances where the gasoline was withdrawn from storage at the said bulk station plants and loaded on trucks or tank wagons, the tanks on such vehicles contained gasoline to be delivered to parties other than the United States, its departments or agencies.

The One Thousand Two Hundred Forty (1,240) gallons of gasoline above described as being delivered from Company Operated Service Stations and the

Thirteen Thousand Three Hundred Twenty-eight (13,328) gallons of gasoline above described as being delivered from Company Consignment Service Stations to the United States, or its departments or agencies, was gasoline which had originally been shipped by the Company's boats or barges from the Company refinery at Port Arthur, Texas, to the Company terminals at Mobile, Alabama; Pensacola, Florida, or Millville, Florida and after its arrival at such terminals it was loaded on railroad cars or in boats and shipped to the various Bulk Station Plants in Alabama where it was unloaded and stored in the Bulk Station Plant tanks or containers, except that the delivery from the Mobile Terminal to the Mobile Bulk Plant was made by pipe lines in the manner aforesaid. Thereafter, such gasoline was withdrawn from storage at such Bulk Plants and delivered in tank trucks or in tank wagons of the Company to the tanks or containers located on the respective premises of such Company Operated or Company Consignment Service Stations. The representatives or employees of the various United States departments or agencies obtained gasoline from such Service Stations by driving the automobiles, trucks or other vehicles belonging to, or being operated by, such departments or agencies into the Service Stations and requesting the Service Station attendants to fill the fuel tanks attached to such vehicles with the desired amount of gasoline. The Service Station attendants would then withdraw the gasoline from the tanks or containers located on said premises and place the desired quantities in the said fuel tanks. All of such purchasers of gasoline, before making such purchases, presented to the Service Station at-

tendants identification cards or other credentials, showing that they were entitled to purchase such gasoline for the United States, or its departments or agencies, and practically all of the gasoline sold and deliverd in this manner was delivered under previous contracts, which the Company had with the United States or its departments or agencies and the amount of gasoline so delivered would be charged to the United States, or the department or agency, for whose account it was delivered and at the end of each calendar month the United States, or its department or agency would, upon being billed for the gasoline so purchased, pay the purchase price of same to the Company.

The Twenty-one Thousand One Hundred Sixty-six and Thirty-six One Hundredths (21,166.36) gallons of gasoline above described as being delivered through Independent Dealers was handled in the same manner that the gasoline was handled through Company Operated and Company Consignment Stations until the gasoline was deposited into the tanks or containers located at the Independent Dealer Stations, at which time title to such gasoline passed to the owner or operator of such Independent Station. When an employee or representative from the United States, its department or agency, drove a vehicle into such Independent Dealer Station, upon his presenting identification card or other credentials showing that he was entitled to purchase gasoline for the United States, or such department or agency, the Independent Dealer would withdraw from storage and place into the fuel tank of such vehicle the desired number of gallons of gasoline and would take from such person a receipt, in duplicate, signed by such

person, showing the amount of gasoline so purchased and delivered, and when a truck driver employee of the Company would next make deliveries of gasoline to the Independent Dealer at his station in Company trucks from a Bulk Plant of the Company, such truck driver employee would deliver without charge to such Dealer an amount of gasoline equivalent to the gasoline previously delivered by the Independent Dealer to the employee or representative of the United States, or department or agency thereof. The truck driver would then deliver to the accounting department of the Company the receipts showing the amount delivered by the Independent Dealer to the employee or representative of the United States, or its department or agency, and the Independent Dealer would not be charged by the Company with the gasoline so delivered to replace the deliveries made by such Independent Dealer to the United States, its department or agency. The Independent Dealer would then be credited by the Company with the same margin of profit that he would have made if he had made a sale of such gasoline to third parties not connected with the United States. These deliveries were made on a credit basis under arrangements or contracts which the Company had with the United States, or the said departments or agencies, and at the end of each calendar month the Company would bill the department or agency for whose account the deliveries had been made through such Independent Stations and would attach to the bill so rendered one of the duplicate receipts signed by the employee or representative of the United States, or department or agency thereof, at the time such gasoline was sold and delivered and such bill would be paid to the Com-

pany in due course. All of the gasoline, which was originally delivered by the Company to the owner or operator of an Independent Dealer Station was billed or charged to such Independent owner or operator, but none of the gasoline which was delivered to such Independent Dealer or operator to replace the gasoline which has been previously delivered by such Independent Operator to the United States Government, or department or agency thereof, in the manner aforesaid was ever billed or charged to said operator. All of said deliveries so made by the Independent Dealers were made under arrangements between the Company and said operators and were made for the account of the Company under contracts which the Company had with the United States or its departments or agencies, and with the understanding that the Company would replace all gasoline so delivered in the manner aforesaid. The Company in its monthly reports to the State Tax Commission included in the amount of gasoline which was shown as delivered and sold to the United States or its departments or agencies during the preceding month the quantity of gasoline which had been handled through the Independent Service Stations in the manner above stated and delivered to the United States or its departments or agencies.

The Company has not paid any taxes with respect to storage and withdrawals from storage of gasoline sold to the United States or its departments or agencies, or with respect to sales of gasoline to such parties, since the decision in the Panhandle Oil Company case (R. 121, 125, 109) (Panhandle Oil Company v. State of Mississippi, ex rel. Knox, Atty. General, 277 U. S. 218.)

Gasoline is a highly volatile and inflammable liquid substance and it is necessary to keep same in closed metal tanks or containers..

A number of the agencies or departments of the United States purchasing gasoline in the State of Alabama are transacting the business of such agencies or departments in every county in the State of Alabama, but such agencies or departments do not have storage tanks or containers or other facilities for the storing of gasoline in all of such counties or at such points where gasoline may from time to time be needed by such agencies or departments. Due to the lack of such storage facilities, such departments or agencies purchase or otherwise obtain gasoline at such points where they have not storage facilities, from retail service stations or from other third parties which may be located at the point where such gasoline is needed or desired by such agencies or departments.

The Company has never stored gasoline in the State of Alabama for the account of other parties.

The terms of the statutes of the State of Alabama were of course agreed on, as were the opinions of the State Attorney General, the administrative practice of the State Tax Commission, and several contracts made by appellee company for the sale and delivery of gasoline to the United States or its departments or agencies.

Schedule 156 et seq. of the Revenue Act of 1935 was approved July 10, 1935, and became effective October 1, 1935.

The opinion of the Attorney General holding that appellee was liable for tax with respect to gasoline stored and withdrawn from storage in Alabama

and sold to the United States, was rendered July 5, 1935 (R. 59.)

The Bill of Complaint herein was filed September 24, 1935.

The contract with the Department of Interior of the United States was dated October 4, 1935, effective October 1, 1935 through June 30, 1936 (R. 214.)

The contract with the Treasury Department Procurement Division was dated September 27, 1935 effective October 1, 1935 through December 31, 1935 (R. 195).

d. SPECIFICATIONS OF THE ERRORS TO BE URGED

The appellants intend to rely upon the contentions that the specially constituted District Court erred:

1. In overruling the motion of defendants to dismiss the bill of complaint.

2. In restraining and enjoining the defendants, and each of them, from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of gasoline or other liquid motor fuels sold, distributed or withdrawn from storage in said State such persons or other parties insofar as said statutes

levy or impose excise taxes on the Texas Company measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States or withdrawn from storage, and which is sold and delivered to the United States by it or for its account under contracts between it and the United States.

3. In restraining and enjoining the defendants, and each of them, from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of gasoline or other liquid motor fuels withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on The Texas Company measured or determined by the quantity of gasoline or other liquid motor fuels withdrawn from storage, and which is sold and delivered to the United States by it or for its account under contracts between it and the United States.

4. In holding that the excise tax imposed by the statutes of the State of Alabama referred to in the bill of complaint is not a tax on the business of storage, but is only on the withdrawal from storage where such withdrawal is for use other than for sale.

5. In holding that a person engaged in the business of selling gasoline and other liquid motor fuels, and engaged also in one or more of the businesses of distributing and storing or withdrawing from storage such commodities is only required by

such statutes as to the gasoline which such person sells to pay a tax measured by the amount of the gasoline sold.

6. In holding that a person engaged in the business of selling gasoline and other liquid motor fuels, and engaged also in one or more of the businesses of distributing and storing or withdrawing from storage such commodities, is not required to pay a tax for the withdrawal from storage of the gasoline which such person sells.

7. In holding that as to gasoline which is sold, the tax is measured exclusively by the number of gallons sold.

8. In holding that the gasoline excise tax acts set forth or referred to in the bill of complaint are unconstitutional and void insofar as they impose an excise tax on account of or with respect to sales of gasoline to the United States measured by the number of gallons sold to the United States.

9. In holding that the necessary effect of the tax measured by the quantity of gasoline withdrawn from storage for sale and delivery to the United States would be to increase the price to the United States for such commodity by the amount of said tax, and that such tax burden would necessarily and directly fall on the United States.

10. In holding that the Constitution of the United States forbids the imposition of an excise tax on account of and with respect to gasoline withdrawn from storage for sale and delivery to the United States measured by the number of gallons so withdrawn from storage.

11. In holding that the plaintiff has no adequate remedy at law in the premises.

12. In not dismissing the plaintiff's bill of complaint.

SUMMARY OF THE ARGUMENT

I.

(a) The trial court was without jurisdiction to enjoin appellants from collecting the tax on past transactions, the only procedure contemplated being suits in which appellee would have its day in court and full advantage of any defenses it might have. (P. 19 infra)

(b) The trial court was without jurisdiction to enjoin the collection of the tax on future transactions because any such writ of injunction would necessarily be supervisory leaving the question to be decided in each case of whether the gasoline was purchased for use by the United States or its agency as instrumentality in the performance of a constitutional governmental function and because further the appellee had a complete and adequate remedy at law under the Statutes of Alabama. (P. 23 infra)

2.

The appellee, The Texas Company, is subject to a tax levied by the gasoline excise tax statute of the State of Alabama upon the privilege of storing gasoline within the State of Alabama, which tax accrues upon and is measured by the amount of gasoline withdrawn from such storage, irrespective of the sale or use to which it may be put after such withdrawal. (P. 33 infra)

3.

The gasoline excise tax levied by the statute of Alabama on the appellee, The Texas Company, being a tax upon the privilege of storing gasoline in Alabama measured by its withdrawal from storage, is not, with regard to purchase of gasoline in the State of Alabama by the United States Government, a tax upon the United States Government or its agencies, nor a tax which operates in such manner as to retard, impede or burden the exercise by the United States of its constitutional powers. (P. ....64.... infra)

ARGUMENT

1. The Jurisdiction of the Trial Court.

The question of jurisdiction of the District Court divides itself into substantially two questions, to-wit, the right to an injunction as to past transactions and the right to an injunction as to future transactions.

(a) Past Transactions.

It is shown by the Bill of Complaint, the Answer and the Agreed Statement of Facts that the State of Alabama is claiming certain taxes on gasoline which is claimed to have been stored and withdrawn from storage by the appellee in Alabama prior to this suit and which gasoline so stored and withdrawn from storage was sold to the United States or its agencies by appellee. A right of injunction to prevent the collection of these taxes is asserted, though entirely unsupported by any authority. It is denied in the answer that appellants have taken any steps other than to notify this appellee and the other oil companies that suit would be filed for the collection of these taxes. It is not shown that any action has been taken other than to have the legal question judi-

cially determined. There is nothing in the record showing any desire on the part of appellants to do other than have a court of law pass on the question. In any event, however, such action by the State against the appellee cannot hinder, retard or delay the United States in the performance of its constitutional functions. The gasoline has long since passed to the Government and whether appellee is liable for tax thereon is a question of law affecting appellee alone. The United States, having purchased the gasoline at a fixed price, is not concerned with appellee's liability for taxes to the State of Alabama.

While Circuit Judge Hutcheson in his dissenting opinion states that he does not understand the majority opinion to hold that an injunction is granted as to past transactions (R. 234), yet the decree of the court provides that the defendants be and they "hereby are restrained and enjoined from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the statutes of the State of Alabama referred to in the Bill of Complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of the gasoline or other liquid motor fuels sold, distributed or withdrawn from storage in said State by such persons or other parties in so far as said statutes levy or impose excise taxes on the Texas Company, measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States

or withdrawn from storage or which is sold and delivered to the United States by it or for its account under contracts between it and the United States." (R. 224.)

From the sweeping form of this decree, it would appear that the appellants are restrained from taking any action as to past transactions as well as future transactions.

It is respectfully submitted that injunction will not lie as to past transactions. Mr. High in his work on Injunctions Volume 1, 4th Edition, Section 491, page 456, declares:

> "Nor will equity restrain in the prosecution of a pending action at law instituted for the purpose of enforcing the collection of taxes upon grounds which may be raised as a defense to that proceeding. Nor will the collection of a tax be enjoined in any case when it is not shown that the injury resulting to its enforcement would be irreparable and this fact must distinctly appear by issuable averments."

Again in Section 23, page 38 of the same volume he states:

> "It (the writ of injunction) is not, therefore, an appropriate remedy to procure relief for past injuries and it is only to be used for the prevention of a future injury actually threatened and to prevent the perpetration of a legal wrong for which no adequate remedy can be had in damages."

We call to the court's attention the cases cited by Circuit Judge Hutcheson on the right to restrain

a suit which has been or is to be brought on account of the invalidity of the claim, to wit, Cavanagh v. Looney, 248 U. S. 453, Boise v. Boise City, 213 U. S. 276, Northport v. Hartley, 283 U. S. 568, Champlin Rfg. Co. v. Commission, 286 U. S. 210, Yarnell v. Hillsborough, 70 Fed. (2nd) 435 and also Scottish Union & National Insurance Co. v. Bowland, 196 U. S. 611. In the latter case, this Court said:

> "If there is no personal liability for these taxes—a point which we do not feel called upon to decide—it is perfectly clear that if service could be had which would make a personal judgment proper, the company could set up its defense by answer in the action at law and there is no necessity to resort to a court of equity for relief. It will be presumed if the claim of the company is right, no personal judgment will be rendered against it and if its theory of the controversy is correct, no such judgment can be lawfully rendered. In such case the authorities are uniform that equity will not interfere by injunction but leave the party to his defense at law."

The only method of collection threatened was by suit and appellee could interpose any defense that it might have to such suit.

It is respectfully submitted that appellees had no right to resort to equity as to the past transactions and that if the decree of the trial court enjoined the filing of a suit for the collection of taxes which had already accrued, such decree was in error.

It is respectfully submitted that the court was without authority to render any injunction as to

matters which had transpired prior to the filing of the bill in this case.

We therefore respectfully submit that in this proceeding the Court should limit its consideration to an interpretation of the 1935 Act (General Acts 1935—p. 508) and to appellee's right to an injunction as to future transactions and that any matters in the record relating to past transactions and former statutes can be considered only and to the extent that they shed light on or fix the proper construction of the 1935 Act.

(b) The right of injunction as to future transactions.

Judicial Code Section 267 U. S. C. A. Title 28, Section 384 declares: "Suits in Equity shall not be sustained in any Court of the United States in any case where a plain, adequate and complete remedy may be had at law." This statement crystalized into statute is but declaratory of the rule generally applying to injunctions and as long held by this court and is the rule in Alabama. It is submitted that under the laws of Alabama and the decisions of the highest court of the State, the appellee had an adequate remedy at law. Alabama Courts have long held that the right to pay the tax under protest and sue for it is an adequate remedy at law. In the early case of Alabama Gold Life Ins. Co. vs. Lott, Tax Collector, 54 Ala. 499, the Supreme Court of Alabama, after a lengthy discussion of the reasons underlying the policy of courts as not favoring injunction suits in tax matters (Pages 507, 508 and 509) concluded:

> "According to the principles embraced in the passages quoted above, complainant did not make out a proper case for the interposition of a court of Equity. The averments of irrepara-

ble mischief, multiplicity of suits and cloud upon title, though ingeniously framed, could be equally well made in any suit of the kind. All the difficulties and suggestions might have been avoided by paying the tax under protest; after which the money, if illegally exacted, could have been recovered back by an action at law without any serious injury, so far as the bill discloses, being inflicted on the company."

See also:

Allred vs. Dunn, Tax Collector, 207 Ala. 469, 93 So. 390;

Patterson vs. Pitts, Tax Collector, 180 Ala. 100, 60 So. 390;

Bower, Tax Collector, vs. Am. L. & Exp. Co., 195 Ala. 572, 71 So. 100;

Adams, Tax Collector, vs. Sou. R. Co., 176 Ala. 320, 58 So. 397;

Oates vs. Whitehead, Tax Collector, 173 Ala. 209; 55 So. 803;

City of Gadsden vs. American National Bank, 225 Ala. 490, 144 So. 93;

Ward, Tax Collector, vs. First National Bank of Hartford, 142 So. 93.

In addition, however, to the general remedy of suing the officer, the legislature of Alabama has, by at least three recent enactments, attempted to give a taxpayer full protection. We call to the court's attention the following Acts:

Act No. 549, approved September 9, 1927 (General Acts 1927, p. 635) provides as follows:

"Section 1. Whenever the amount or validity of any tax which may be levied against any tax payer or his property, whether the same be an ad valorem tax, privilege tax, franchise tax, or other tax, is in litigation, the tax payer may, pending such controversy or litigation, elect to pay the tax under protest and upon such election and the payment of such tax, the officer of the State or County receiving the same shall note on the receipt that said tax is paid under protest or pending litigation.

"Section 2. The payment of the tax as provided in Section 1 in this Act shall not affect the right to test and determine the validity or amount of said tax in any manner provided by law, and the proceeding to determine the validity of said tax shall proceed as if said tax had not been paid, but upon proof of payment of said tax before the court in which said action may be pending, the fact of payment shall be ascertained and recited in the judgment, and if the tax shall have been paid in full, no execution shall issue against the tax payer except for such costs as the tax payer may be liable for, and in the event it shall be determined and adjudged that the tax so paid was invalid in whole or in part or excessive in amount, the court hearing said proceeding shall so ascertain and determine, and by its judgment or decree shall fix the amount of the tax which was invalid, or which was excessive, and thereupon upon the presentation of a certified copy of the judgment to the State Auditor, it shall be the duty of the State Auditor to draw his warrant on the State

Treasurer in favor of such tax payer for such an amount as the judgment of the court shall ascertain and declare has been erroneously paid to the State, and such warrant of the State Auditor shall be payable out of any funds in the State Treasury not otherwise appropriated.

"Section 3. Upon the presentation of a certified copy of such judgment to the Board of Revenue, or other governing body of any County which may have received any part of said tax erroneously paid, as determined by the judgment, it shall be the duty of the said Board of Revenue or other governing body of the County to draw its warrant on the County Treasurer in favor of the tax payer for such amount of said tax as may have been erroneously paid to the County."

Again in 1931, the Legislature of Alabama passed another enactment, Act. No. 432, approved July 17, 1931 (General Acts, 1931, page 527). This Act provides:

"Section 1. That where any taxpayer in the payment of taxes or licenses which are paid directly to the State Tax Commission, and where by a mistake of fact or law has paid an amount in excess of the amount due or has made an erroneous payment, the State Auditor is authorized to draw his warrant on the State Treasurer in favor of such taxpayer, and the State Treasurer is authorized to pay such warrant for the amount of such over-payment or erroneous payment.

"Section 2. Before any refund under this Section can be made the taxpayer, his heirs, successors or assigns, shall file in duplicate, petition directed to the State Tax Commissioner setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within twelve months from the date of such payment.

"Section 3. The State Tax Commission shall examine said petition and the records of the State Tax Commission, and if the facts set forth in the petition are such as to entitle the petitioner to the refunding of the money as prayed for and the State Tax Commissioner upon the evidence adduced is satisfied that the petitioner is entitled to the refund as prayed for, he shall so certify to the Auditor stating the amount to be refunded by the State, the particular fund on which such warrant shall be drawn and forward to the Auditor copy of the petition with the certificate attached, and if the Auditor shall be satisfied that the petition is in form required by law, he shall draw his warrant on the State Treasurer as hereinabove provided for the amount certified to him by the State Tax Commissioner.

"Section 4. This Act shall become effective upon approval by the Governor."

Apparently, the only objection which appellee has to this act is that it does not specifically provide for the payment of interest. It is, we respectfully submit, as simple a procedure to secure a refund of taxes illegally paid as could well be provided. We

have been unable to find any decision of this court or the Supreme Court of Alabama specifically holding that the failure to provide for the refund of interest denies a taxpayer an adequate remedy at law, although certain District Courts have so held. (Nutt vs. Ellerbe et al., 56 F (2nd) 1059) It is clear, however, that this statute affords a taxpayer a simple remedy for securing a refund of any amount which he actually erroneously over-paid.

The Legislature, by the General Revenue Act of 1935, Act No. 194, approved July 10, 1935 (General Acts 1935, page 256 et seq.), very carefully attempted to give a taxpayer, making an overpayment or a payment of taxes illegally exacted, adequate protection. In fact, we cannot but conclude that the statutes were written with the fixed purpose of removing the threat of injunctive process from the orderly administration of the tax statutes.

By Section 78, (page 294 of General Acts of 1935) appeals from property assessments are provided and specific machinery for refunds including the payment of interest thereon, are provided. By Section 103 (Page 307, General Acts of 1935), appeals from assesments made by the State Tax Commission and refunds of erroneous or excess payments with interest thereon are provided for. Section 379 of the same Act (General Acts, 1935, p. 568) provides:

> "Section 379. Whenever any taxpayer claims that any tax, except ad valorem taxes, herein levied, as fixed by the collecting officer is excessive or is invalid either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same shall note

on the receipt that such tax was paid under protest. Within sixty days after such payment under protest, the taxpayer shall commence suit against the officer for the recovery of such amount as is claimed to be excessive or invalid, and unless such suit is commenced within such period of sixty days from such payment, such payment shall be deemed voluntary. Upon hearing and judgment the Court shall determine what amount so paid is excessive or illegal, and shall order the same to be repaid by the State or its agencies receiving the same in the same manner as is provided in cases of appeals from the State Tax Commission, and such amount shall be refunded in the same manner."

The Pertinent part of Section 103, to which Section 379 refers is as follows:

"If upon such appeal the assessment made by the State Tax Commission is reduced, the Court upon proof of payment of said tax shall ascertain and recite such fact in the judgment and shall ascertain and determine by its judgment or decree, the amount of tax which was invalid or which was excessive both as to the amount paid to the State, counties, county boards of education, municipaliites or other governmental agencies receiving any part of such taxes, and upon presentation of a certified copy of the judgment to the State Comptroller, it shall be the duy of the State Comptroller to draw his warrant on the State Treasurer in favor of such taxpayer for such an amount as the judgment of the court shall ascertain and

declare has been erroneously paid to the State, together with interest from date of payment, and such warrant of the State Comptroller shall be paid out of any funds in the State Treasury as a current obligation of the year in which said refund is ordered. Upon presentation of a certified copy of such judgment to the Court of County Commissioners or other governing body of any county, or upon presentation of a certified copy of such judgment to a county board of education, or to the city council or other governing body of any municipality, or upon presentation of a certified copy to the governing body of any other agency of the State which may have received any part of said tax erroneously paid as determined by the judgment, it shall be the duty of said court of County Commissioners or other governmental body of the County, or the County Board of Education of the city council or other governmental body of a municipality, or of the governmental body of any other agency receiving any part of such taxes to draw its warrant on the Treasurer of such county, school board, municipality, or other agency in favor of the taxpayer for such amount of said tax as may have been erroneously paid to such County, School Board, municipality or other agency, together with interest from date of payment. Such amounts shall constitute claims preferred over all other claims and the respective treasurers are hereby required to refund such amounts received by said County, School Board, municipality or other agency."

This statute (Section 379) provides as full and complete a remedy as can be conceived. Appellant, in the court below, contended that the sixty-day provision contained therein would cause a multiplicity of suits. He argued further that the fact that the gasoline money was required to be distributed among the various counties would require the filing of suits against the sixty-seven counties. Under the statute above quoted, if it be a fact that the Treasurer of the State is required to distribute the portion of the tax appropriated to the counties, it would nevertheless be the duty of the counties, upon the case being adjudicated, to immediately refund that part of such tax received by the individual county. However, the Supreme Court of Alabama in *Jefferson County vs. Hard*, 227 Ala. 201, 149 So. 81, held the gasoline tax to be a State tax and not a county tax and held the amount distributed to the counties to be a mere appropriation out of the State Treasury. It is patent, we submit, that if any portion of the tax be paid under protest so as to "earmark" it specially to await judicial action, it would not be subject to distribution and the argument that appellant might have to sue sixty-seven counties is without merit. We respectfully submit that appellant's construction of these various statutes is distorted and fanciful. By pursuing the remedy afforded by the 1935 statute, appellant, on the bare possibility of having to file one or more additional suits to keep the statute of limitations from running, can recover any amount which is erroneously paid, with interest at the legal rate of 6%. Moreover, if it so desires, immediately upon the determination of the suit filed under the 1935 Statute, it can by the simple remedy of apply-

ing to the State Tax Commission under the 1931 Statute have any additional amounts refunded without further litigation. We respectfully submit that the policy of filing one or more additional suits to prevent the statute of limitations from running, pending the determination of a legal question is not such a multiplicity of suits as to authorize a remedy in equity. We submit that these statutes give plaintiff an adequate remedy at law and bring it within the decisions of this court in *Mathews vs. Rogers*, 284 U. S. 521, and *Stratton vs. St. L. & S. F. R. R. Co.*, 284 U. S. 530.

However, as Circuit Judge Hutcheson, in his dissenting opinion states:

> "Federal Equity Jurisdiction ought not to be exerted in this case because there is lacking here a substantial showing of a really threatened and irreparable injury calling for that jurisdiction."

This injunction, as pointed out by Circuit Judge Hutcheson, is in its nature supervisory. For a supervisory injunction to issue under any circumstances it is, we submit, necessary for the appellee to prove that the tax statute *properly* construed not only hinders, delays and retards the United States in the performance of its constitutional functions, but also that any agency, because of which immunity is asserted is engaged strictly in performing constitutional governmental functions, and that the gasoline purchased by such agency is so used.

We submit that the principles laid down in the cases of *South Carolina vs. United States*, 199 U. S. 437; *Ohio vs. Helvering* 292 U. S. 360 and *Helvering*

vs. Powers, 293 U. S. 214, apply with equal force and significance to the Federal Government so far as the State power of taxation is concerned, when the government through its numerous agencies, corporate and otherwise, engages in functions other than governmental.

We may, we submit, with propriety point out that immunity is claimed on account of sales made to the Department of Agriculture (R. 128). While nothing is shown as to the uses to which such gasoline was applied, it is a fair assumption that a portion of that heretofore sold to the Department of Agriculture was for the Agricultural Adjustment Administration, an activity of the Government held beyond its constitutional powers in United States v. Butler, 80 L. ed. p. 287 (Adv. Sheets No. 5).

2. Meaning and construction of the gasoline excise tax act of Alabama as applied to appellee, The Texas Company.

THE APPELLEE, THE TEXAS COMPANY, IS SUBJECT TO A TAX LEVIED BY THE GASOLINE EXCISE TAX STATUTE OF THE STATE OF ALABAMA UPON THE PRIVILEGE OF STORING GASOLINE WITHIN THE STATE OF ALABAMA, WHICH TAX ACCRUES UPON AND IS MEASURED BY THE AMOUNT OF GASOLINE WITHDRAWN FROM SUCH STORAGE, IRRESPECTIVE OF THE SALE OR USE TO WHICH IT MAY BE PUT AFTER SUCH WITHDRAWAL.

Before the constitutionality of the gasoline excise tax acts of the State of Alabama, or the constitutionality of the method of enforcement and ad-

ministration of those acts can be passed upon, the acts themselves must first be examined and their meaning and construction determined on. The bill of complaint refers (R. 2, 10) to some seven separate legislative enactments officially published in General Acts of Alabama, 1923 page 36; 1927 page 326; 1927 page 16; 1931 page 859; 1932 page 314; also an Act approved January 31, 1935 (Acts 1935, page 30) and an Act approved July 10th, 1935 (Acts 1935, page 508).

The verbiage of these several acts is similar, but the majority opinion of the Trial Court is inaccurate when it states that the several acts "contain the same verbiage so the construction of one applies to all". (R. 228). In some material respects the acts differ. For example, the majority opinion of the Trial Court refers to Section 3 of the Act of 1927 amending the Act of 1923 (General Acts of Alabama, 1927, page 326) (R. 227).

> "Section 3 of the Act provides:
>
> 'every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the *selling*, distributing or withdrawing from storage for any use gasoline as herein defined in this State.'
>
> "Here the tax is to be paid, not on the storage but on the sale, distribution or withdrawal from storage."

Again recognizing the significance attached by the majority to their conception that the statute failed to impose a tax on the storage, there later appears in their opinion the following (R. 229):

"In each instance the tax is 'measured by' the number of gallons sold, distributed or withdrawn. It nowhere imposes a tax on storage alone".

Would the majority have been of the same opinion if they had given due weight to the fact that the Act now in force, approved July 10th, 1935, adds to the language of the 1927 Act (Acts 1927, page 326) explicit words to show that storage was intended to be taxed? (R. 45) (Gen. Acts of Ala., 1935, page 508)

"Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, *storing or* withdrawing from storage in this State for any use, gasoline as herein defined." (Emphasis ours).

The words "storing or" did not appear in the 1927 Act construed in the majority opinion. It is, therefore, important at the outset to determine which of the several Acts is now operative, and with which of those Acts this Court is concerned.

The bill alleges and the answer admits that the several gasoline excise tax acts were superseded by the General Revenue Act of Alabama approved July 10th, 1935, which in effect consolidates the levies and imposes "an excise tax of six cents per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline". (R. 10). Of the Acts referred to in the bill, that act alone is now in force and effect and has a prospective operation, and therefore it is the statute, the enforcement and executive of which is sought to be re-

strained. The first three sections of that act define its nature, the remainder of the statute being dedevoted to procedure. We, therefore, quote the first three sections of the act approved July 10, 1935, and now in force:

"SCHEDULE 156. As used in this Chapter, the term 'gasoline' shall include gasoline, naphtha and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines; provided, however, that nothing in this Chapter shall be held to apply to those products known commercially as 'kerosene oil', 'fuel oil' or 'crude oil' commonly used for lighting, heating or industrial purposes. The word 'person' means and includes persons, corporations, co-partnerships, companies, counties, municipal corporations, school boards or agencies of the State, or other agencies, associations, incorporated or otherwise singular or plural. The term 'distributor' shall include any person who engages in the selling of gasoline in this State by wholesole domestic trade, but shall not apply to any transaction of such distributor in interstate commerce. The word 'refiner' shall include any person who manufactures, distills, blends, compounds or mixes any one or more products in the production of a liquid motor fuel as herein defined. The term 'retail dealer' shall include any person herein defined as distributor who is also engaged in the selling of gasoline in this State at any place in this State in broken quantities. The term 'storer' as herein used shall include any person who ships or causes to be shipped or re-

ceives gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same for any purpose.

"SCHEDULE 156.1. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline as herein defined, provided, however, that this excise tax shall not be levied on the sale of gasoline in interstate commerce, and provided further that where the excise tax of six cents ($0.06) per gallon upon the sale, distribution, storage or withdrawal from storage of such gasoline shall have been paid by a distributor, refiner, or by retail dealer or storer, such payment shall be sufficient, the intention being that the tax shall be paid but once.

"SCHEDULE 156.2. The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals be for sale or for other use; provided, that 'sellers' of gasoline and its substitute paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

Under the proper meaning and construction of that Act is the tax laid upon every storer of gaso-

line, or is a storer who is also a seller of the same gasoline exempt from the storage tax and subject only to a sales tax? The majority opinion held the latter construction and arrived at the following definition of a storer:

> "So a storer is one who stores for his own use and not for the purpose of sale, and the tax is levied only where he withdraws the gasoline for his own use."

We respectfully submit that this conception of a storer is refuted by the explicit terms of the statute itself. There, by Schedule 156.1, the tax is imposed upon "every *storer*, storing or withdrawing from storage *for any use*". Schedule 156 defines "storer":

> "The term 'storer' as herein used shall include any person who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same *for any purpose.*" (Emphasis ours).

Schedule 156.2 provides in part:

> "The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage, *whether such withdrawals be for sale or other use.*" (Emphasis ours).

The construction of the act as to who is a storer by the majority opinion is not only refuted by the language of the statute itself, but is not founded upon a single previous decision. The correct construc-

tion, we respectfully submit, is well pointed out by Circuit Judge Hutcheson in his dissenting opinion.

> "My difference with the majority is fundamental. They think the tax is on the sale. With respect, I submit that it is not. That statute which lays this tax lays it on plaintiff as a storer in the State. It becomes payable by it when the gasoline is withdrawn for ultimate use by the storer, whether that use is to consume it or to part with title and possession of it by sale or otherwise. The Supreme Court of Alabama once (State v. City of Montgomery 228 Ala. 93, 151 So. 856,) and the Fifth Circuit Court of Appeals twice (Pan American Pet. Corp. v. State of Alabama, 67 Fed. (2nd) 590, Certiorari denied 291 U. S. 670, Ervin & Stevens v. State of Ala., et al (Ms.) decided Nov. 22, 1935) has so declared. No contrary opinion has been called to my attention."

The substantial facts involved in State v. City of Montgomery, 228 Ala. 93, 151 So. 856, were that the City of Montgomery purchased gasoline without the State, receiving it in tank cars and storing it in its own storage tanks and thereafter withdrawing the gasoline therefrom for use in Municipal purposes. The question presented involved the nature of the tax and whether the City was liable therefor. The Court was necessarily required to determine the acts made the subject of the tax. After reciting the legislative history of the acts, the court *held that the several acts imposed a tax upon the storage measured by the amount withdrawn from storage.* In classifying such a tax as an excise tax rather than a property tax, the Court said:

"There is a clear distinction between (1) an excise tax upon the business, occupation, or privilege of owning, storing and withdrawing gasoline, imposed not only for revenue but also *because it is a dangerous explosive, and within the police power of the state*, and (2) a tax upon the separate acts of the owner in taking this property out of storage for his own use; for this is a property tax. This distinction is clearly defined in Dawson v. Kentucky Dist. Co., 255 U. S. 288, 41 S. Ct. 272, 65 L. ed. 638." (Emphasis ours).

The Alabama Supreme Court further used the following language:

"The acts in question impose a tax upon a storer as well as a distributor or retail dealer. We think this is true though it is not due until it is withdrawn from storage, and is measured by the amount so withdrawn rather than the amount placed in storage. True, it may leak out, waste out of storage, or explode, and thereby and to that extent no tax is payable; *but the whole of the acts taken together show, we think, that the purpose is to impose the tax on the storage, though measured by the amount withdrawn, and then it becomes due to be paid.*

"*Since the privilege of storing is made the basis of the tax, and for that purpose an excise tax may be levied*, it is not controlled by Section 91 of the Constitution (exempting municipal property from property or ad valorem taxes) *and it is immaterial to what use it is put after it is withdrawn from storage.*" (Emphasis ours).

This is a clear construction of the statutes in this regard and was necessary to the proper disposition of the questions before the Court. The fact that the Court further held the tax did not apply to the City on the sole theory that the cities of the State not having been expressly included in the provisions of the statutes were deemed exempt, in no way detracts from its decision on the other question.

The Court, after giving the foregoing construction of the statute, addressed itself to the question of the intention of the legislature and decided that, in the absence of an expressed inclusion of municipalities, there was no intention to tax. It inter alia stated:

> "There is no infringement of this principle to hold that when a city buys gasoline from a dealer who is subject to the tax, the amount of it should not be deducted. The tax is imposed on the dealer and not on the city in that transaction, though it incidentally is paid in the amount of the purchase price. Orange State Oil Co. v. Amos, 100 Fla. 884, 130 So. 707."

This clearly shows that the Court considered the tax to be levied on the original storer and, even though afterward purchased by a state governmental agency, that the dealer could not claim any immunity therefor; that the only way in which a city or even the State of Alabama could use the gasoline without the payment of the tax was by importing it and storing it itself.

In this connection it may be noted that the State Tax Commission has uniformly collected the excise tax with respect to all gasoline stored or withdrawn

from storage in Alabama for sales to the State or to counties, municipalities or other political subdivisions of the State without allowing any deduction on account of such sales or without any claim having been made for such deduction. (R. 108).

It is most significant that the Alabama statute of 1935 now before the Court was adopted after, and with regard to, the construction placed upon the prior acts in State v. City of Montgomery, supra, and uses even stronger language than that which the Court held in that case constituted a *tax upon the privilege of storing gasoline*, which accrued and was to be measured by the *amount withdrawn from storage.* The face of the 1935 Act shows that the legislature particularly had in mind the City of Montgomery decision in that municipal corporations held exempt from the tax by that decision were expressly included in the provisions of the new Act, (Schedule 156) reading in pertinent part:

> "The word 'person' means and includes persons, corporations, co-partnerships, companies, counties, *municipal corporations*, school boards or agencies of the State, or other agencies, associations, incorporated or otherwise singular or plural." (Emphasis ours).

The language of the previous gasoline excise tax acts had also been construed by the Court of Appeals for the Fifth Circuit in Pan American Petroleum Corp. v. State of Alabama, 67 F. (2nd) 590 (Certiorari denied 291 U. S. 670, 78 L. ed. 1060, 54 S.C.R. 454), as constituting a tax not on sales, but upon storage and withdrawal from storage in the State. In that case the Oil Company had stored gasoline in the

State of Alabama in bulk plants and withdrawn the particular gasoline in question from storage in Alabama and delivered it by the company's tank trucks and containers to Post Exchanges located upon United States Government Military Reservations at Camp McClellan and Maxwell Field. The territory embraced in these military reservations had been acquired by the United States by purchase and jurisdiction over them had been ceded to the United States by the State of Alabama in due form. The question was whether the Oil Company was liable for the excise tax with regard to its action in storing such gasoline and withdrawing the same from storage and delivering the same to such Post Exchanges located within the territory or confines of such military reservations. The Oil Company denied liability for the tax upon two grounds, (1), that the tax did not accrue or apply except upon the actual sale and delivery of the gasoline, which sale and delivery was actually consummated at a place over which the State of Alabama had no jurisdiction and therefore the tax did not apply, and (2) that the Post Exchanges were instruments or agencies of the United States Government. The Court, in an opinion written by Judge Bryan, held that the tax levied by the Alabama statutes definitely accrued upon the withdrawal of the gasoline from storage, and having accrued before actual delivery it was not material whether the gasoline was actually delivered technically within the State of Alabama, or upon territory over which the State of Alabama had no jurisdiction. In this connection the Court used the following pertinent language:

"That a State has the power to levy an excise tax upon the withdrawal of gasoline from storage, regardless of the use to which it is put, and even though it be consumed in the generation of motive power for carrying on interstate commerce, is settled by the decision of the Supreme Court in Edelman v. Boeing Air Transport, 289 U. S. 249, 53 Sup. Court, 591, 77 L. ed. 1155."

In this decision the Court was very careful to distinguish the tax levied by the Alabama statutes from taxes on sales levied by the statutes of other states. The defendant in that proceeding relied strongly on the decision in Pan-Handle Oil Company v. State of Mississippi, 277 U. S. 218, 48 Sup. Ct. 451, 72 L. ed. 857, and the Court in distinguishing the Alabama tax from the sales tax which was before the Court in the Panhandle decision, said:

"It is to be conceded that an excise tax on the sale of gasoline is inoperative as to sales made to the United States, either directly or indirectly, through one of its departments, for government use, Panhandle Oil Co. v. State of Mississippi (citation above.) There a sale of gasoline was made direct to the United States for the use of the Coast Guard and a government hospital. No doubt the ruling would have been the same if the sales had been made directly to the instrumentalities of the Government, for then also the United States would have been the real purchaser. BUT THE TAX HERE IS NOT ON THE SALE BUT IS ON THE WITHDRAWAL OF THE GASOLINE." (Emphasis ours).

The fact that the Court then also held that the Post Exchanges were not instrumentalities of the United States Government cannot be said to detract from its careful construction of the Alabama statutes, because it clearly appears that in the question before the Court the character of the tax and the basis upon which it was levied were of greater importance than the character of the person or agencies which purchased the gasoline.

In the case of Ervin and Stevens v. State of Alabama, et al 80 Fed (2nd) 432, decided November 22nd, 1935, the question was whether a railroad company owed the State of Alabama for taxes as a storer of gasoline. The company transported into the State in tank cars gasoline which it kept in Alabama for its own use. The Court held that it was liable for the tax, and, of the nature of the tax, said:

> "It has been decided that the tax is a valid excise upon the storage of gasoline measured by the withdrawals. State v. City of Montgomery, 228 Ala. 93; Pan American Petroleum Corporation vs. State of Alabama, 67 Fed. (2d) 590. c/f Foster and Creighton v. Graham, 285 S. W. 570; N. C. & St. L. v. Wallace, 288 U. S. 249; Edelman v. Boeing Air Transport, 289 U. S. 249." * * * * * * * * *
>
> "The tax in question was not intended to be, it is not, a property tax. It is an excise. It falls not upon the gasoline, but upon the act of withdrawing it from storage. It is due by one who stores and withdraws because of the act of withdrawal. If one is a storer within the

meaning of the statute, that is, if he brings gasoline into the State in tank quantities for storage and withdraws it, the tax is due by him on the withdrawals of that gasoline, whether it is stored in the State in tanks or is stored there in small receptacles."

The language used in the Alabama statutes was taken almost literally from the gasoline excise tax levied by the laws of Tennessee of 1925, and as subsequently amended. These statutes of Tennessee contained, as does every statute of the State of Alabama enacted since 1927, the express legislative declaration that "the tax imposed by this Act shall apply to persons, firms or corporations, dealers or distributors, storing any of the products mentioned in this act, and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawal be for sale or other use." These statutes of Tennessee were presented to the Supreme Court of the United States in Nashville C. & St. L. Ry. v. Wallace 288 U. S. 249, 53 Sup. Ct. 345. In construing the character of the tax levied and the basis upon which it operated, the Court said:

"Storage of the gasoline and withdrawal of it from storage within the State for use *or sale* are, as the State's Supreme Court has held, the events which, by the very terms of the statute, call it into operation. * * * "

"The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements. * * * Here the tax is imposed on the successive exercise of two of these powers,

the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins." (Emphasis ours).

This decision involved interstate commerce and not a withdrawal from storage and sale of gasoline to the United States Government. It is submitted, however, that this is a clear recognition by this Court that the Tennessee statute meant just what the legislative declaration said it did—that the tax was a tax upon the storage and withdrawal from storage of gasoline within the State and not otherwise. In this regard the statutes of Tennessee are identical with the statutes of Alabama here involved.

The same construction in this regard was given to the same Tennessee statutes in American Airways v. Wallace, 57 Fed. (2nd) 877, by a special statutory three-judge court in denying an injunction against the collection of the taxes levied by the Tennessee statutes, insofar as they applied to the transactions by the plaintiff with respect to gasoline which it had purchased in interstate commerce, stored in tanks on its own property at its airports, and withdrawn from storage exclusively for fueling planes carrying United States mail, freight and passengers in interstate commerce.

Likewise, the Supreme Court of the State of Tennessee had construed the same Tennessee statute in Foster & Creighton Co. v. Graham, 154 Tenn. 412; 285 S. W. 570; 47 A. L. R. 976. The opinion states:

"We think the act, when properly interpreted, not only applies to distributors and dealers in gasoline, but applies to consumers

who purchase gasoline in interstate commerce and store it, and thereafter distribute the same, or allow the same to be withdrawn from storage, *whether such withdrawal be for sale or other use.* It, therefore, necessarily follows that complainant, and all other persons, etc., in like situations, come within the provisions of said act." (Emphasis ours).

In that case the question was not involved of whether one in appellee's position, who is a storer of gasoline and also a distributor and retail dealer, should pay a tax on storage or a tax on sales. The plaintiff in that case had never been a distributor or dealer in gasoline, nor had it engaged in the business of storing the same for any other purpose than its own use. The contention was that the Act did not impose the tax upon one who is not a dealer or distributor, but only stores gasoline in its own tank and withdraws the same for its own use. The Court decided against that contention, and clearly and specifically held that the tax was upon the storage of the gasoline. The basis for imposing such a tax as an excise rather than a property tax was stated by the Court in language which makes clear the reason and theory upon which a tax on the storage of gasoline is based:

"The argument is that the right to store gasoline in quantity is a natural right, but this argument is not sound.

"If this argument were correct, upon the same principle one would have the right to store dynamite or gunpowder though the storing of dynamite or gunpowder might affect the health

> or safety of the public. The storing of these commodities is certainly not a natural right. Gasoline is likewise an intrinsically dangerous substance. It follows, therefore, that the State has the right to control the use of it as well as the sale of it. There cannot be any natural right to handle and use it without restraint. One method of regulation is by means of a privilege tax. One of the necessary effects of such tax is to remove the motive for storing it in quantity, because, if the tax of three cents a gallon cannot be saved, it is reasonable to assume that the consumer would buy it from the distributor as needed."

In passing we may notice that the Alabama Supreme Court in the case of State of Alabama v. City of Montgomery, 228 Ala. 93, 151 So. 856, adopted the same reasoning and called attention that an excise tax might be laid upon the privilege of storing and withdrawing gasoline not only for revenue, but "also because it is a dangerous explosive and within the police power of the State."

The decision of the Tennessee Supreme Court in the case of Foster & Creighton Co. v. Graham, supra, is in line with the decision of the Alabama Supreme Court in the case of State of Alabama v. City of Montgomery, supra, and with the two decisions of the Fifth Circuit Court of Appeals in Pan American Petroleum Corp. v. State of Alabama, 67 Fed. (2nd) 590, and Ervin & Stevens v. State of Alabama 80 Fed (2nd) 432, decided November 22nd, 1935, and with the decision of the United States Supreme Court in the case of Nashville C. & St. L. Ry. v. Wallace, supra, and of the special statutory three-judge

Federal Court in the case of American Airways v. Wallace, supra, to the effect that the tax levied by the gasoline excise tax statute is a tax upon the privilege of storing gasoline, which tax is measured by the amount of gasoline withdrawn from storage "for any purpose", and "whether such withdrawals be for sale or other use".

That the separate acts of a person in storing gasoline and withdrawing it from storage are proper independent subjects of state taxation and properly within the taxing power of the State, irrespective of a subsequent and immediately connected use, is further recognized by the Supreme Court of the United States in Edelman v. Boeing Air Transport, 289 U. S. 249, 53 Sup. Court 591, 77 L. ed. 1155. In that case it appeared that the Transport Company purchased outside of the State of Wyoming and brought into the State in interstate commerce certain gasoline which was stored in fuel tanks at its airports and which was thereafter withdrawn from those tanks exclusively for the purpose of filling the tanks of its airplanes used only in interstate commerce. The statutes of Wyoming applied, among other things, to any person "using" gasoline within the State. This Court held that while the "use" of the gasoline in furnishing motive power for the operation of the planes engaged in interstate commerce was beyond the power of taxation, that nevertheless the "use" to which the gasoline was put in *withdrawing it from tanks and placing it in the fuel tank of the plane so used*, although a necessary antecedent to the actual use of the gasoline in interstate commerce, *was* within the power of taxation enjoyed by the State of Wyoming as a legally sep-

arate act. Touching the power of the State to tax these separate antecedent acts, the Court used the following language:

> "A State may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in No. 176, Nashville C. & St. L. R. Co. v. Wallace, supra. There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to . . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson v. Kentucky, 279 U. S. 245, 73 L. ed. 683, 49 S. Ct. 279.' As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations."

If we properly interpret the majority opinion written by Judge Ervin (R. 226 et. seq.) it holds that the Alabama Gasoline Tax Statutes, including the 1935 Act, levy what is in nature and substance a sales tax as to all gasoline sold or which is stored and withdrawn from storage and sold and levies a storage tax on that amount stored and withdrawn from storage for *use*. In other words, Judge Ervin

concludes that the tax is a license tax on the dealer, distributor or storer, the amount of which license is determined according to the manner in which such person may engage in business. If engaged in the business of selling, his license is measured by his sales. If engaged in the business of storing and withdrawing from storage for his own use, his tax is measured by the withdrawals. Judge Ervin's decision holds the tax on storers to be a tax on *the use of the gasoline* for the storers own purposes, and as to all other withdrawals the tax is a tax on the dealer, distributor or storer, measured by his sales.

Such an interpretation we respectfully submit cannot be afforded the statutes in view of the decisions in the cases of State vs. City of Montgomery, supra, Pan American Petroleum Corp. vs. State, supra, and Ervin & Stevens, Receivers, etc. vs. the State, supra.

In the case of the State vs. City of Montgomery, the Supreme Court of Alabama was very careful to sustain the tax as an excise on the storage of gasoline for the reason that it is an inflammable product and carefully indicated that a tax on the mere storage and withdrawal of a product generally, to be used for one's own purposes would be a property tax (citing Dawson vs. Kentucky Distilling Co.).

Judge Ervin, apparently ignoring the decision of the Alabama Supreme Court defining the statute and by which definition we respectfully submit he was bound, construed the statute, so far as the storage features of the tax are concerned, to be a tax on the use of the gasoline by the storer.

While it is true that certain states have upheld excises on the use of gasoline and the same have

been sustained by this Court (Edelman vs. Boeing Air Transp. 289 U. S. 252) yet the Supreme Court of Alabama refused to so denominate the tax, in effect holding that if such were the nature of the tax, it would be a property tax and violative of the State Constitution, the rate being in excess of the constitutional maximum for property taxes.

It is therefore respectfully submitted that Judge Ervin's interpretation of the storage feature cannot be sustained, it being contrary to and contradictory of the interpretation placed on the statute by the highest court of the State of Alabama whose decision as to the meaning of a local law controls both the district court and this court.

> "'As to questions depending upon construction of state laws, the decision of the state court is controlling on writ of error to it, and this even though a similar provision of a State statute has been differently construed by the Federal Court.'"
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> "Detroit & M. Railway Co. v. Fletcher Paper Co., 39 Supreme Court 13, 248 U. S. 30, affirming Fletcher Paper Co. vs. Detroit & M. Railway Co., 198 Mich. 469.
>
> "'The construction of a State statute made by the highest State court insofar as it determines the meaning of the statute, is binding upon the Federal Supreme Court.'
>
> "American Manufacturing Co. vs. City of St. Louis, 39 Supreme Court Reporter 522, 250 U. S. 459.
>
> "'The Supreme Court must accept the decision of the highest State court fixing the

meaning of state legislation, as though such meaning has been specifically expressed therein.'

"Supreme Lodge, Knights of Pythias vs. Meyer, 44 Supreme Court Reporter, 432, 265 U. S. 30.

"Federal Courts must follow State Supreme Courts' interpretation of State statutes.

"3rd Decennial Digest, Courts, Section 366-1, 2nd Decennial Digest, Courts, Section 366-1,

Kansas City, Memphis & Birmingham Ry. Co. v. Stiles, 37 Sup. Ct. 48."

Further, the interpretation given to the statute by Judge Erwin is likewise directly opposed to the decision in the case of Pan-American Petroleum Corp. vs. State, 67 Fed. (2nd) 590 (Certiorari denied 291 U. S. 670, 78 L. ed. 1060, 54 S. C. R. 454).

This case is illuminating not only because of the rule of law laid down which we quoted just above but because of the facts upon which the decision was predicated. A careful analysis of the facts will disclose an irreconcilable conflict between the decision in the Pan-American case as based on the interpretation of the statute therein and the result which would have been arrived at, had Judge Ervin's interpretation been applied to the facts.

May we briefly summarize: In the Pan-American Case (1) the gasoline was stored and withdrawn from storage in the City of Montgomery. (2) The gasoline was sold upon a government reservation to which the State of Alabama had relinquished all jurisdiction (Code 1923 Section 1505) except

the right to serve legal process. This cession, of course, included the power of taxation and if the tax were on the sale, the sale transpiring on territory over which the state had no jurisdiction it follows that no tax would have accrued and the Company would have been entitled to judgment.

The Circuit Court of Appeals for the Fifth Circuit following the decision of the Supreme Court of Alabama in State vs. City of Montgomery refused to accept this interpretation and held the tax to be a tax on storage measured by the amount withdrawn from storage and such withdrawal having taken place within the jurisdiction of the State of Alabama the tax accrued and the fact that thereafter the gasoline was sold and delivered on a government reservation over which the State had no jurisdiction could not affect the Company's liability for the tax.

It is patent we respectfully submit that if Judge Ervin's interpretation be correct that where gasoline is sold the tax is on the sale an opposite decision from that reached by the Circuit Court of Appeals would have been necessary because the tax being on the sale and the sale taking place at a point over which the State of Alabama had no taxing power, no tax could have been imposed.

> Standard Oil Company of California v. California 291 U S., 242 (decided one week from the denial of certiorari in the Pan-American Petroleum case).

The same interpretation as given in the State vs. City of Montgomery and the Pan-American Petroleum Corp. cases was reaffirmed by the Circuit

Court of Appeals Fifth Circuit in case of Ervin & Stevens, Receivers, etc. vs. the State, decided just prior to the decision of the three judge court in the present case.

As we understand the law, the construction given by the highest court of the State as to the meaning of a local statute controls. We further submit that the interpretation given by the Circuit Court of Appeals, Fifth Circuit, in which certiorari was denied by this court fixes the interpretation of this statute and Judge Ervin was bound thereby. We further submit that his construction of the statute is opposed to the construction given by the State Court, the Circuit Court of Appeals of his own Circuit and therefore was laid in error.

It further seems to us that any such construction is refuted by the express language of the statute, which, at the risk of repetition, we again quote:

> "The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this chapter, *storing* gasoline and distributing the same or *allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use.*" (Emphasis ours).

Again Section 156 of the 1935 Act defines the term storer as follows:

> "The term 'storer' as herein used shall include any person who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same *for any purpose.*" (Emphasis ours).

It was suggested that if the legislature intended this to be purely a tax on storage measured by withdrawals, why did the legislature make any provision for distributors and retail dealers or sellers paying the tax at all?

The tax is imposed upon four different classes, viz: refiners, storers, distributors and retail dealers. These four classes include every possible class handling gasoline from the time of its distillation, to the time of its delivery to the ultimate consumer. The tax is required to be paid but once. If in the successive stages of the distribution of gasoline, the tax is once paid by the refiner, no tax is thereafter due for handling that gasoline from the storer, the distributor or the retail dealer. If not collected from the refiner, then ordinarily the "storer" would pay the tax. And if from any cause, the tax was not collected from the storer, the distributor would be liable for its payment, and finally, if the gasoline reached the retail dealer without the tax having been paid, then the retail dealer must pay the tax. While the tax should be paid but once, the Legislature had the distinct purpose of requiring that it actually be paid and of preventing evasions. If the gasoline was not "refined" in Alabama, then of course the tax could not be imposed on the "refiner." The next class in line is the "storer" explicitly defined by statute, which again for convenience and at the risk of repetition, we quote:

> "The term 'storer' as herein used shall include any person who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner

and withdraws or uses the same for any purpose."

To be a "storer" a person must not only "store" gasoline and withdraw the same, but he must be the one who ships or causes it to be shipped or receives the gasoline into this State.

In Ervin & Stevens v. State of Alabama, 80 Fed. (2nd) 432, decided November 22nd, 1935, the Fifth Circuit Court of Appeals said:

> "We agree with appellee that the statute in defining storer as 'one who ships' used the word 'ships' not in the commercial, but in the physical sense of putting on board of a ship, vessel, or other form of transportation for carriage into the State. The railroad, in bringing the gasoline in over its own line and by use of its own facilities without issuing papers on it, as truly shipped it as if it had consigned it to itself over its own or another line. What the statute in its definition looked to was not the means employed to transport or bring in, but the fact of transportation or bringing in."

And further in the same opinion the test of a storer within the meaning of the statute is stated to be "if he brings gasoline into the State * * * for storage and withdraws it."

It is, therefore, apparent that there may be "distributors" and "retail dealers" in gasoline, who are not "storers" within the meaning of the statute. True, in a broad sense every prson who handles gasoline up to the time it reaches the consumer "stores" the same on account of the very nature of the sub-

stance. As stated in Paragraph XI of the agreed statement of facts (R. 125):

> "Gasoline is a highly volatile and inflammable liquid substance and it is necessary to keep same in closed metal tanks or containers. When gasoline of the seller is stored in storage tanks or containers located in Alabama, before said gasoline can be delivered into storage tanks or containers or in the fuel tanks of vehicles of purchasers thereof, it is necessary to first withdraw such gasoline from storage from the tanks or containers of the seller."

However, to be a "storer" as defined in the statute, a person must be the one who brings the gasoline into Alabama, its first recipient in this State. "Distributors" and "retail dealers" who acquire their gasoline from a supply already in the State of Alabama are not, under the terms of the statute, "Storers". True it would seem that all gasoline in the State would usually either be "refined" here, or be brought into the State and stored, and hence the terms "refiners" and "storers" may have been sufficient to impose a tax with respect to every gallon of gasoline in Alabama. However, it was permissible and prudent for the Legislature to provide in effect that if the tax, from any cause whatever, was not collected from the refiner or storer, then it should be paid by the distributor or the retail dealer. The tax is primarily a tax on storage. It is only when the gasoline has in some manner escaped that tax that the handling of such gasoline is subject to a tax measured by the quantity sold.

The appellee, the Texas Company, confessedly comes within the statutory definition of a "storer"

of all of the gasoline which it handles. All of the gasoline it sells or withdraws from storage in Alabama is manufactured or refined at its refinery located at Port Arthur, Texas, and then shipped into Alabama and stored at its terminal in Mobile, or at one or more of its thirty-six bulk plants located in Alabama. (Paragraph VI of Agreed Statement of Facts, R. 114).

Appellee's learned counsel devoted a great portion of his argument in the District Court to the construction of Schedule 156.2 of the 1935 Act providing as follows:

> "The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided that '*sellers*' of gasoline and its substitutes paying the tax herein provided *may* pay the same computed and paid on the basis of their sales as hereinafter required and *refiners, storers and distributors shall compute* and *pay* this tax on the basis of their withdrawals or distributions." (Emphasis ours).

The use of the words "may" and "shall" is significant. As a general rule, the word "may" when used in a statute is permissive only, while the word "shall" is imperative. 59 C. J. 1079, Sec. 635; Coleman v. Eutaw, 157 Ala. 327, 47 So. 703.

The statute says storers and distributors "shall compute and pay this tax on the basis of their withdrawals or distributions." Could any command

be expressed in more positive language? Admittedly this plaintiff is a storer.

What class did the legislature have in mind in using the word "seller" in the administrative proviso in Schedule 156.2 of the 1935 Act? It is used in contradistinction to the words "refiners, storers and distributors." "Sellers" are permitted to pay the tax computed on the basis of their sales. "Refiners, storers and distributors" are required to compute and pay the tax on the basis of their withdrawals or distributions. The first section of the 1935 statute contains a number of express definitions. It defines the terms "refiner" and "storer" and "distributor". It does not define the term "seller", but it does define "retail dealer" as a person "who is engaged in the *selling* of gasoline in this State at any place in broken quantities". In at least ten separate sections of the act (156.1, 156.4, 156.5, 156.6, 156.7, 156.8, 156.14 156.15, 156.17, 156.18) the four classes upon whom the tax is imposed are listed in identical language, viz: "*distributor*, *refiner*, *storer*, or *retail dealer*". Those are the four terms expressly defined. The proviso in Schedule 156.2 quoted above uses three of those terms, "*refiners*, *storers* and *distributors*" and a fourth separate class "sellers". We respectfully submit that it is obvious that the word "sellers" does not include those who are "refiners, storers or distributors", but does include "retail dealers", and possibly cover other classes of "sellers" who might not be also "storers".

The legislature may have had in mind that refiners, storers and distributors could easily keep records and compute and pay the tax on the basis of their withdrawals from storage or distributions,

while the "retail dealer" or "seller" would ordinarily make no withdrawals from storage except in broken small and irregular quantities for sale and delivery to the ultimate consumer, and hence his records as to sales would normally be the same as his withdrawals.

Another purpose served by including "sellers" among those subject to the tax is to prevent evasions on the part of any "seller", who claimed not to be a "storer" and who did not acquire the gasoline sold from a "storer". For example, gasoline might be delivered by pipe line from storage plants in other states direct to the consumer in Alabama, in which event it certainly would not be clear that the gasoline had ever been "stored" in Alabama.

Whatever purpose the legislature may have had in using the term "sellers" it did by express mandate require that *"storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."* The appellee owns itself to be a storer and hence, we submit, must compute and pay this tax on the basis of its withdrawals.

Appellee's learned counsel argued at length in the District Court about the administrative construction of the acts, basing their argument mostly upon the liberality of the State Tax Commission in permitting all "sellers" of gasoline, whether also "storers" or not to pay the tax upon the basis of their sales. We submit this was too broad a conception of the word "sellers" but whether so or not, this administrative construction was simply a matter of convenience and cannot avail appellee. Up to the time of the decision of the Panhandle case in 1928, the State Attorney General had held that the tax ap-

plied with respect to gasoline sold the United States, and the plaintiff and other oil companies had so paid the tax. During that period the 1927 Acts were passed and it cannot be argued that the legislature then intended to exclude gasoline sold to the United States from the calculation of the tax. After the decision in the Panhandle case, the State Attorney General did misconceive the extent of the principle there announced, but the error of the Attorney General followed by the taxing officials was more in misunderstanding the limit to which the State's power of taxation extended under the Panhandle decision, than in misconstruing the State statute.

Certainly any administrative construction appearing in this case is not entitled to further consideration after the clear pronouncement of the Circuit Court of Appeals in Pan American Petroleum Corporation v. State of Alabama, 67 F. (2nd) 590, and the unequivocal construction of the statute by the Supreme Court of Alabama in State v. City of Montgomery, 228 Ala. 93, 151 So. 856, and the still later enactment of the 1935 statute with a view especially of meeting a part of the decision in the latter case.

In a very recent case the Alabama Supreme Court declined to follow the construction placed by the State Tax Commission on another section of the license schedule over a long period of years, remarking that such construction was entitled to weight "only when the meaning of the statute is doubtful. Stewart, Clerk, etc. v. Wilson Printing Co., 210 Ala. 624, 99 So. 92; United States v. Healy, 160 U. S. 136, 16 S. Ct. 247, 40 L ed. 369."

State v. Tuscaloosa Building & Loan Association, 161 So. 530, 534.

The meaning of the present statute is not doubtful when it covers in one section the storing of gasoline and its withdrawal *"for any purpose"* and in another section *"whether such withdrawals be for sale or other use."* The appellee admittedly is a "storer" of all of its gasoline (R. 113,115), and we submit, it is subject to the excise tax for such storage, regardless of the use to which the gasoline may afterward be applied.

3. CONSTITUTIONALITY OF THE GASOLINE EXCISE TAX ACT AS APPLIED TO APPELLEE, THE TEXAS COMPANY.

THE GASOLINE EXCISE TAX LEVIED BY THE STATUTES OF ALABAMA ON THE APPELLEE, THE TEXAS COMPANY, BEING A TAX UPON THE PRIVILEGE OF STORING GASOLINE IN ALABAMA MEASURED BY ITS WITHDRAWAL FROM STORAGE, IS NOT, WITH REGARD TO PURCHASE OF GASOLINE IN THE STATE OF ALABAMA BY THE UNITED STATES GOVERNMENT, A TAX UPON THE UNITED STATES GOVERNMENT OR ITS AGENCIES, NOR A TAX WHICH OPERATES IN SUCH MANNER AS TO RETARD, IMPEDE OR BURDEN THE EXERCISE BY THE UNITED STATES OF ITS CONSTITUTIONAL POWERS.

The case principally relied upon by the appellee marks the extreme limit to which the United States Supreme Court has been willing to clothe a

private individual doing business with the Federal government with immunity from State taxation.

Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. ed. 857.

Mr. Justice Holmes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice McReynolds vigorously dissented from that decision.

In that case the tax was "one cent per gallon upon the sale of gasoline." The very transaction by which the United States acquired the gasoline was taxed. That case was distinguished by the Fifth Circuit Court of Appeals from the tax here involved in Pan American Petroleum Corporation v. State, 67 F. (2nd) 590, Certiorari denied 291 U. S. 670, because "the tax here is not on the sale but is on the withdrawal of the gasoline".

The tax should be paid but once. Appellee contends that the storage tax is not paid with respect to gasoline sold. What difference does it make whether with respect to gasoline sold the tax is measured by the amount withdrawn from storage, or by the amount sold? The important consideration is the nature of the tax and how it actually operates.

Educational Films Corp. v. Ward, 282 U.S. 379, 387, 75 L. ed. 400, 404.

Under the Alabama statute, what is termed an excise tax is imposed with respect to every gallon of gasoline, refined, stored, distributed or sold. While the tax is called an excise tax, the terms of the excise are so broad as to cover every gallon of gasoline in the State at least as soon as it has come to rest and is not a part of interstate commerce. Insofar as the Constitution of the United States is con-

cerned, it is the same as if the State had imposed upon gasoline a flat advalorem or property tax of six cents on the gallon to be paid but once. Surely the United States on purchasing gasoline could not complain that its vendor had become subject to such an advalorem tax, and hence that the price of the gasoline to it was increased. So closely does this tax resemble a property tax that in the case of State of Alabama v. City of Montgomery, 228 Ala. 93, 151 So. 856, the Alabama Supreme Court found it necessary to distinguish it from a property tax upon the ground that gasoline is an explosive, and hence the privilege of owning and storing it is within the police power.

The Supreme Court of the State of Tennessee in considering the statute upon which the Alabama statute was modeled, also justified that enactment as a valid exercise of the police power because gasoline is intrinsically a dangerous substance, and one of the necessary effects of the tax is to remove the motive for storing it in quantity in that State.

Foster & Creighton Co. v. Graham 154 Tenn. 412; 285 S.W. 570; 47 A. L. R. 976.

The appellee also urges that it makes no difference whether the tax be called a tax on the withdrawal from storage or a tax on the sale, its practical effect is the same—the loss falls on the United States just as directly.

Appellee, we submit, takes too narrow a view of the tax—and herein, we submit, lies an essential distinction between the present statute and the Missippi Act considered in the Panhandle Oil Co. case. That Act was purely and simply a tax on the sale

of gasoline, on the very transaction by which the United States acquired title. Here the tax is more than a sales tax. It covers every possible use to which the gasoline might be put. And certainly in the case of appellee company, the tax had legally attached in favor of the State prior to the application of the gasoline to a sale to the United States.

Appellee's argument must lead to the conclusion that the small independent dealers, the distributors or retailers who do not themselves bring the gasoline into the State, but who purchase it from a storer must include in their purchase price the amount of the tax. If those small independent dealers should thereafter sell some of the gasoline to the United States or its agencies the tax would already have been paid, and such sale would furnish no ground for its recovery. The logical result of appellee's contention would, therefore, be to exclude the small independent dealers from trading with or selling gasoline to the United States, or its agencies, and to give to the large storers a monopoly on the government business.

In Indian Motorcycle Co. v. United States, 283 U. S. 570, 75 L. ed. 1277, the rule was applied in favor of the Company which sold a motorcycle to the City of Westfield, Massachusetts for use in its police service. The majority opinion by Mr. Justice Van Devanter commented:

> "Under the constitutional principle the exertion of such a function by a State or a State agency has the same immunity from Federal taxation that like exertions by the United States or its agencies have from state taxation. Here the tax is laid directly on the sale to a govern-

mental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus the transaction falls within the class which the United States cannot tax consistently with the constitutional principle."

Again, Mr. Justice Stone dissented with a most able opinion concurred in by Mr. Justice Brandeis. In the course of his dissenting opinion Mr. Justice Stone used language, part of which is quoted in the answer of the defendants in this case:

"In the Panhandle Oil Co. case it was held that this shifting of the burden of a state tax from the seller to the buyer was sufficient to render the tax invalid where the buyer was an agency of the United States, and it was assumed that the burden of the sales tax involved was so inevitably passed on to the buyer as to require this result. With this assumption economists would not, I believe, generally agree. Many hold that whether the burden of any tax paid by the seller is actually passed on to the buyer depends upon considerations so various and complex as to preclude the assumption a priori that any particular tax at any particular time is passed on. In some conditions of the market, the burden remains with the seller, or even may be shifted back from the seller to the producer by the reduction of the producer's price rather than forward to the consumer by an increase of the seller's price."

It may be noted in passing that the Supreme Court of Alabama had made a similar observation in Woco Pep Co. of Montgomery v. City of Montgomery (Ala.) 121 So. 64, 65.

> "We would give emphasis once for all to the principle that whether the tax must be passed on to the consumer or not is not a controlling nor a material inquiry in such cases. Legislative policy should keep in mind such results, but they are not of concern in passing upon the validity of the law. Such inquiry would bring all privilege taxes under review for causes involving complexities not to be considered. It may be said to be common knowledge that tax burdens of all kinds are figured by every business in connection with or as part of its overhead expense, and prices fixed to yield a net profit. The consumer pays the tax."

In this connection it may be noted also that the present contracts between plaintiff and the United States introduced in evidence by plaintiff, were made after the 1935 Act was passed, and after the last opinion of the Alabama Attorney General, and yet the burden of the tax was not passed on to the Federal Government.

The case of Wheeler Lumber B. & S. Co. v. United States, 281 U. S. 572, 74 L. ed. 1047, is well nigh conclusive of this case. There the holding was that a Federal tax of three per cent of the amount paid for transportation of bridge material sold to counties f.o.b. the places of destination was valid, even though the transportation was necessary to effect delivery by the seller:

"The tax is not laid on the sale nor because of the sale. It is laid on the transportation and is measured by the transportation charges. True, it appears that here the transportation was had with a view to a definite sale; but the fact remains that the transportation was not part of the sale but preliminary to it and wholly the vendor's affair. United States v. Normile, 239 U. S. 344, 348, 60 L. ed. 319, 321, 36 Sup. Ct. Rep. 122, Ann. Cas. 1918E 34. It follows that the tax on the transportation cannot be regarded as a tax or burden on the sale. Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383.

"As the tax is not laid on the sale or in any wise measured by it, the case of Panhandle Oil Co. v. Mississippi 277 U. S. 218, 72 L. ed. 857, 56 A.L.R. 583, 48 Sup. Ct. Rep. 451, referred to in the question and relied on by the plaintiff, is not in point."

In that case before the transportation had been commenced and before the tax fastened, the materials had already been definitely appropriated for sale and delivery to the counties. In the present case, the gasoline was stored, and became subject to a tax to be computed and paid upon its withdrawal from storage before it was known whether that particular gasoline would be sold to the United States or to private individuals.

That case is followed in Trinity Farm Constr. Co. v. Grosjean, 291 U. S. 466, 78 L. ed. 918. In that case there was involved the Louisiana statute which levied a tax of four cents a gallon "on all gasoline or motor fuel sold, used or consumed in the State

of Louisiana for domestic consumption." As construed by the State Supreme Court, the exaction was an excise tax levied upon all gasoline or motor fuel sold, used or consumed in the State. The appellant had contracts with the United States for the construction of levees in Louisiana to control the waters of the Mississippi River and consumed much gasoline in the operation of machinery to do that work. It transported a supply from other States in carload lots, and placed it in a central tank from which distribution was made to other tanks located on its right-of-way in proximity to the machines. It was held that the imposition of the tax on gasoline consumed by this contractor was not an unconstitutional taxation of means or instrumentalities of the Federal Government. The Court said in part:

> "Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc. that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct."

In the case at bar what difference in principle is there between a State tax on appellee's storage tanks and equipment, and a State tax on the privilege of storing the gasoline? To paraphrase the last

sentence of the opinion just quoted, if the payment of State taxes imposed on the property and operations of appellee affects the Federal government at all, it at most gives rise to a burden which is consequential and remote, and not to one that is necessary, immediate or direct.

The levying of an excise by the States upon various taxable privileges, even though the measure of such tax may include Government instrumentalities has long been recognized.

In Educational Films v. Ward, supra, this court, speaking through Mr. Justice Stone thus discussed the question of constitutional immunity:

> "Under the Constitution the privilege of exercising the corporate franchise is the ligitimate object, and the immunity of federal instrumentalities from taxation, a legitimate restriction, of the state power to tax. To give both to the power and to the immunity such a practical construction as will not unduly restrict the power of the government imposing the tax, or the exercise of the functions of the government which may be affected by it, is the problem necessarily involved in determining the extent of the immunity. See Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384. So far as it concerns the power of a state to impose a tax on corporate franchises, the problem has long since ceased to be novel. While this court, since McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other,

Weston v. City Council of Charleston, 2 Pet. 449, 7 L. Ed. 481; Federal Land Bank v. Crossland, 261 U. S. 374; it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other.

"The precise question now presented was definitely answered in Flint v. Stone Tracy Co., 220 U. S. 107, 162, et. seq., 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, which upheld a federal tax, levied upon a corporate franchise granted by a state, but measured by the entire corporate income, including, in that case income from tax exempt municipal bonds. In reaching this conclusion, the court reaffirmed the distinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on governmental instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income.

"Upon a like principle other forms of excise tax have been upheld, although the statutory measure of the tax included securities

constitutionally immune from any form of direct taxation. A state inheritance or legacy tax is valid, although measured by the value of United States bonds which are transmitted. Plummer v. Coler, 178 U. S. 115, 20 S. Ct. 829, ***. By parity of reasoning an inheritance tax may be levied by a state on a bequest to the United States, United States v. Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. Ed. 287, and by the United States on a bequest to a municipality. * * * Similerly, state laws, taxing to stockholders, at full value, shares in national banks, are upheld, although the banks own tax exempt United States bonds. Van Allen v. Assessors, 3 Wall. 573, 583, 18 L. Ed. 229; * * * A tax on net income is not a forbidden tax on exports because it includes receipts from exports in the computation of the income, Peck & Co. v. Lowe, 247 U. S. 165, * * * Nor is the inclusion in a state income tax of receipts from interstate commerce a prohibited burden on commerce. United States Glue Co. v. Oak Creek, 247 U. S. 321. * * *"

"It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject-matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present, which can in no case have any incidence, unless the tax-

payer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other non-discriminatory method."

By parity of reasoning we submit that an excise on a storer of gasoline, measured by the amount withdrawn from such storage is a legitimate exercise of the state's taxing power, and that it is no objection to the tax because the incidental effect of taxing such privilege may be to increase the price paid by the purchaser subsequent to such storage and withdrawal from storage, and this is no less true if the United States happens to be the purchaser.

In Lash's Products Co. v. United States, 278 U. S. 175, a statute of the United States which imposed on "soft drinks sold by the manufacturer * * * in bottles or other closed containers, a tax equivalent to ten per cent (10%) of the price for which so sold "was construed to be a privilege tax measured by the amount sold, and this Court, in discussing an attempt of a taxpayer to "pass on the tax", said:

> "The phrase 'passed the tax on', is inaccurate as obviously the tax is laid and remains on the manufacturer and on it alone. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all."

This case seems opposed in principle at least to Panhandle v. Mississippi, supra. It would appear that if an excise on a manufacturer measured by sales is not a tax on one purchaser, it would not be on another even though such purchaser be the United States. The original Alabama Gasoline Act of 1923

was construed to levy an excise tax on the dealer or distributor for the privilege of engaging in business, measured by sales (see opinion of Attorney General of March 22, 1923, Exhibit A to answer, R. 91).

It is shown also that acting under this construction, the tax was paid on all sales including those to the United States until the decision in Panhandle v. Mississippi (R. 109).

At the time of this opinion, the tax was a privilege tax on the distributor or dealer measured by sales. In 1927, and by various enactments hereinabove detailed, the tax was made a *privilege* tax on the *storer* for the privilege of storing, measured by the amount stored and withdrawn from storage.

If the purchaser does not pay any tax under a statute levying a privilege tax measured by sales as was held in Lash's Products Company v. United States, supra, it would certainly appear that when a taxable privilege is even further removed and the tax is imposed on the disassociated and independent privilege of storing, it cannot be contended with logic that the purchaser pays the tax. And we submit that logic places the United States in the same category with the State of Alabama and all other purchasers of gasoline who purchased from a licensed storer who has stored and withdrawn such gasoline from storage in the State of Alabama.

In American Airways v. Wallace, 57 Fed. (2nd) 877 which was an effort of an interstate carrier of mail, freight and passengers by plane to enjoin the collection of a like tax under the very much similar statutes of Tennessee above referred to on gasoline purchased by the Company admittedly in interstate commerce, stored on its own property and

used exclusively in fueling planes engaged in carrying United States mail, freight and passengers in interstate commerce, the Court said:

> "It is apparent that not every person who uses his property or derives a profit in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. Metcalf v. Mitchell, 269 U. S. 514, 460 Sup. Ct. 172, 70 L. ed. 384."
>
> * * * * *
>
> "The statute in question does not impose a tax on the Federal Government, nor an instrumentality of the government, nor is it a burden upon or regulation of a governmental function. It is simply a privilege tax upon engaging in a business within the State, and applies to all persons, firms or corporations doing a like business."

In State v. City of Montgomery, supra, the Alabama Supreme Court said, "that the purpose is to impose the tax on the storage though measured by the amount withdrawn." Let us assume that the Legislature, in its discretion, had made the storage measured *by the amount placed in storage* and payable thereupon. At the time it would be placed in storage no one could tell whether it would ultimately be withdrawn and sold and delivered to the United States. Yet would that uncertainty render the storage of any part of the gasoline not taxable?

We respectfully submit that once it be clearly understood that the tax here in question is a tax up-

on storage and not upon sales, its constitutionality with respect to gasoline withdrawn from storage for any purpose, including sale and delivery to the United States, becomes beyond question.

Respectfully submitted

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This is to certify that a copy of the above and foregoing brief for appellant has been mailed to the Hon. John S. Coleman, Comer Building, Birmingham, Alabama, Counsel for Appellee, with proper postage attached.

This the 16th day of March, 1936.

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APR 1 1936

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 727

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL.,

Appellants,

vs.

THE TEXAS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

BRIEF OF APPELLEE.

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INDEX.

SUBJECT INDEX.

	Page
Statement of the case	1
(1) Pleadings and decree	1
(2) Statement of the facts	4
(3) History of the Gasoline Tax Statutes	9
(4) Administrative interpretation of the gasoline tax statutes	10
Summary of the argument	15
Argument	20
I. Jurisdiction	20
(1) A three-judge court was properly convened	20
(2) Amount in controversy	22
(3) The Texas Company can maintain the suit	23
II. Plaintiff had no adequate remedy at law	24
III. Equity jurisdiction with respect to taxes on future deliveries of gasoline under contracts between the Texas Company and the United States	38
IV. Plaintiff's right to maintain the bill in equity as to taxes claimed by the State on past transactions	45
V. The Alabama gasoline tax statutes impose an excise tax for the privilege of selling, distributing or withdrawing from storage gasoline and as to the gasoline sold the tax is measured exclusively by the number of gallons sold	51
(1) History of the Alabama gasoline tax statutes	51
(2) Interpretation of the gasoline tax statutes based on the language therein employed	60
(3) Administrative interpretations of the Alabama gasoline tax statutes	66
(4) There have been no interpretations by the Alabama Supreme Court of the provisions of the gasoline tax statutes imposing a privilege tax on the selling or distribution of gasoline	73
(5) As the gasoline statutes tax gasoline sold in the State measured by the number of gallons sold, the tax cannot be collected on the gasoline sold by the Texas Company to the United States, as this would be a tax on the United States contrary to the Federal Constitution	81
(6) The gasoline delivered by the independent service station dealers under contracts which the Texas Company had with the United States is not subject to the tax	82

Page

(7) An excise tax measured by the number of gallons of gasoline withdrawn from storage for sale and delivery to the United States is a tax on the United States 87

(8) An excise tax measured by the number of gallons withdrawn from storage for sale and delivery to the United States imposes a tax burden on the United States in the same manner as does an excise tax measured by the amount sold..... 95

(9) The State is not now in position to claim that the Texas Company is liable for taxes on the gasoline which was sold and delivered by it to the United States during the past five years..... 110

Conclusion 110

Appendix 112

Exhibit A.—Alabama gasoline tax statute adopted February 10, 1923 114

Exhibit B.—Plea to jurisdiction filed in case of Southern Bell Telephone Company v. Henry S. Long, as Chairman, etc., in U. S. District Court, Northern Division of the Middle District of Alabama..... 114

Exhibit C.—Abstracts of gasoline statutes in other States..... 118

Exhibit D.—Sec. 869, Code of Alabama of 1923 120

136

TABLE OF CASES CITED.

Alabama v. United States, 38 F. (2d) 897..... 42

Alabama v. United States, 282 U. S. 502, 75 L. Ed. 492..... 43

Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114 ..... 17, 30

Alabama Industrial School v. Adler, 144 Ala. 555, 42 So. 116..... 17, 31

American Airways v. Wallace, 57 F. (2d) 877..... 16, 28, 58

Berryman v. Whitman College, 222 U. S. 334, 56 L. Ed. 225..... 23

Bitterman v. L. & N. Railroad Company, 207 U. S. 205, 52 L. Ed. 171 23

Brucker v. Fisher, 49 F. (2d) 759 22

Buchanan v. Warley, 245 U. S. 60, 62, L. Ed. 149..... 15, 24

Butler v. Shulte, 67 F. (2d) 632 ..... 16, 34

City Bank Farmers Trust Co. v. Schnader, 291 U. S. 24, 78 L. Ed. 628 ..... 17, 32

Clallam County v. United States, 263 U. S. 341, 68 L. Ed. 328..... 110

Coombe v. United States, 3 F. (2d) 714 72

Cummings v. Merchants National Bank of Toledo, 101 U. S. 153, 25 L. Ed. 903 ..... 15, 23

Curen v. New York, 79 N. Y. 511..... 20, 111

Davis v. Wakelee, 156 U. S. 680, 39 L. Ed. 578..... 37

Dawson v. Kentucky Distilleries & Warehouse, 255 U. S. 288, 65 L. Ed. 638 ..... 19, 37, 94

Dismuke v. United States, — U. S. — (No. 199, October Term, 1935, decided Feb. 3, 1936) 20, 72

Page

Edelman v. Boeing Air Transport, 289 U. S. 249, 77 L. Ed. 1155..... 108
Ervin et al v. State of Alabama, 80 F. (2d) 432..... 80
Exchange Drug Co. v. State Tax Commission, 218 Ala. 114, 117 So. 673 36
Federal Land Bank v. Crosland, 261 U. S. 374, 67 L. Ed. 703..... 95
Foster & Creighton Co. v. Graham, 154 Tenn. 412, 285 S. W. 570, 47 A. L. R. 976 54
Gillespie v. Oklahoma, 257 U. S. 501, 66 L. Ed. 338..... 109
Graysburg Oil Co. v. State of Texas, 278 U. S. 582, 73 L. Ed. 519.... 18, 81
Gregg Dyeing Co. v. Query, 286 U. S. 472, 76 L. Ed. 1232, 84 A. L. R. 831 ..... 19, 55, 95
Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101..... 15, 23
Helvering v. Powers, 292 U. S. 620..... 41
Hopkins v. Southern California Telephone Company, 275 U. S. 393, 72 L. Ed. 329..... ..... 16, 34
Hunt v. New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821..... 23
Indian Motocycle Company v. United States, 283 U. S. 570, 75 L. Ed. 1277 ..... 18, 81
Indian Motocycle Company v. United States, 9 Fed. Supp. 608; certiorari denied, 56 Sup. Ct. 116 85
Indiana v. Milk, 11 Fed. 389 20
Jefferson County v. Hard, 227 Ala. 201, 149 So. 81..... 19, 99
Johnson v. Maryland, 254 U. S. 51, 65 L. Ed. 126..... 109
Lee v. Bickell, 292 U. S. 415, 78 L. Ed. 1337..... 16, 107
Louisville & Nashville Railroad Company v. Greene, 244 U. S. 522, 61 L. Ed. 1291 ..... 18, 49
Matthews v. Rogers, 284 U. S. 521, 76 L. Ed. 447..... 16, 28
McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579..... 42
Monamotor Oil Co. v Johnson, 292 U. S. 85, 78, L. Ed. 1141..... 19, 101
N. C. & St. L. R. Co. v. Wallace, 288 U. S. 249, 77 L. Ed. 730..... 57
Norfolk National Bank v. Commissioner of Internal Revenue, 66 F. (2d) 48 87
Northwestern Mutual Life Insurance Company v. Wisconsin, 275 U. S. 136, 72 L. Ed. 202 110
Nutt v. Ellerbe, 56 F. (2d) 1058..... 16, 34
Ohio v. Helvering, 292 U. S. 360 41
Ohio Tax Cases, 232 U. S. 576, 58 L. Ed. 737..... 17, 49
Osborn v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204..... 42
Packard v. Banton, 264 U. S. 140, 68 L. Ed. 596..... 23
Pan American Petroleum Corporation v. State of Alabama, 67 F. (2d) 590 ..... 76, 77
Panhandle Oil Company v. Mississippi, 277 U. S. 218, 72 L. Ed. 857, 10, 15, 18, 23, 66
Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. Ed. 363..... 72
Philadelphia v. Anderson, 142 Pa. 357, 21 Atl. 976, 12 L. R. A. 751... 20, 111
Pierce v. Society of Sisters, 268 U. S. 510, 69 L. Ed. 1070..... 15, 24
Procter & Gamble Distributing Co. v. Sherman, 2 F. (2d) 165..... 16, 34

Page

Raymond v. Chicago Union Traction Company, 207 U. S. 20, 52 L. Ed. 78 ..... 17, 18, 49
Savage v. Jones, 225 U. S. 501, 56 L. Ed. 1182 ..... 15, 24
Shaffer v. Carter, 252 U. S. 37, 64 L. Ed. 445 37
Sheip v. Amos, 100 Fla. 863, 130 So. 699 ..... 19, 94
Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175, 53 L. Ed. 753 ..... 18, 52
Smith v. Kansas City Title and Trust Company, 255 U. S. 180, 65 L. Ed. 577 42
Smith v. Reeves, 178 U. S. 436, 44 L. Ed. 1140 ..... 17, 29
South Carolina v. United States, 199 U. S. 437 41
Southern Railway Company v. Query, 21 F. (2d) 333 ..... 17, 33
State v. City of Montgomery, 228 Ala. 93, 151 So. 856 73
Station WBT, Inc. v. Poulnot, 46 F. (2d) 671 ..... 15, 24
Sterling v. Constantin, 287 U. S. 378, 77 L. Ed. 375 ..... 15, 18, 21
Stewart Dry Goods Company v. Lewis, 294 U. S. 550, 79 L. Ed. 1054. 90
St. Louis Cotton Compress Company v. Arkansas, 260 U. S. 346, 67 L. Ed. 297 90
Stratton v. St. Louis Southwestern Railway Company, 282 U. S. 10, 75 L. Ed. 135 ..... 15, 22
Surgett v. Lapice, 8 How. 48, 12 L. Ed. 982 71
Terrace v. Thompson, 263 U. S. 197, 68 L. Ed. 255 49
Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131 ..... 15, 24
Union Insurance Company v. Hoge, 21 How. 35, 16 L. Ed. 61 71
Union Pacific Railroad Company v. Weld County, 247 U. S. 282, 62 L. Ed. 1110 37
United States v. Stinson, 125 Fed. 907, 49 L. Ed. 724 ..... 20, 111
United States v. Willamette, 54 Fed. 807 ..... 20, 111
Walker v. United States, 139 Fed. 409 ..... 20, 111
Wallace v. Hines, 253 U. S. 66, 64 L. Ed. 782 37
Western Union Telegraph Company v. Andrews, 216 U. S. 165, 54 L. Ed. 430 ..... 17, 18, 48
Western Union Telegraph Company v. State of Texas, 105 U. S. 460, 26 L. Ed. 1067 108
White v. Alabama Insane Hospital, 138 Ala. 479, 35 So. 454 ..... 17, 31
Williams v. Standard Oil Company, 278 U. S. 235, 73 L. Ed. 287 102
Williams v. Talladega, 226 U. S. 404, 57 L. Ed. 275 108
Wilson v. Illinois Southern Railway Company, 263 U. S. 574, 68 L. Ed. 456 ..... 16, 18, 28, 49
Woco Pep Company of Montgomery v. Butler, Chairman of State Tax Commission, 225 Ala. 256, 142 So. 509 36

STATUTES CITED.

Alabama Revenue Act of July 10, 1935, Schedule 156 53
156.1 ..... 60, 63, 70
156.2 ..... 63, 64, 70
156.3 92
156.5 92
156.14 ..... 65, 92

Page

Civil Code of South Carolina of 1932, Sec. 2512 95
Constitution of Alabama of 1901 Sec. 14 29
Delaware—Senate Bill 122, approved April 18, 1935 104
Gasoline Tax Statutes of Alabama, Section 1, First 1927 Act 52
2 " " 60
2, Second 1927 Act 52
1, 1931 Act 52
1, 1932 Act 53
1, First 1935 Act 53
General Acts of Alabama 1927, page 635 33
General Acts of Alabama 1931, page 527 33
General Acts of 1932, p. 57, Sec. 6 47
General Acts of 1935, p. 568 .....
Judicial Code, Sec. 266 (28 U. S. C. A., Sec. 380) 2, 4, 15
Oregon Laws 1933, ch. 428, Sec. 5 103
Revenue Act of 1935, Sec. 103 ..... 27, 32
379 ..... 24, 32, 33
380 ..... 26, 29, 33

OTHER AUTHORITIES CITED.

Opinion of Attorney General of Alabama, August 22, 1928 ..... 18, 84
Willoughby on the Constitution of the United States, Volume 1, Second Edition, pages 144 and 155 44

SUPREME COURT OF THE UNITED STATES

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No. 727

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL.,

Appellants,

vs.

THE TEXAS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

BRIEF OF APPELLEE.

Statement of the Case.

The opinion of the district court is reported in 13 Federal Supplement, page 242.

(1) *Pleadings and Decree.*

This suit was a bill in equity which was filed on September 24, 1935, by The Texas Company, a Delaware corporation qualified to transact business in Alabama, in the United States District Court for the Middle District of Alabama,

at Montgomery, Alabama, against certain officials of the State of Alabama, all of whom are residents of Alabama and charged with the duty of administering and enforcing the gasoline excise tax statutes of that State.

The plaintiff claimed that the defendants were seeking to collect from it excise taxes based on or measured by the gasoline sold by it or withdrawn from storage by it in Alabama for sale and delivery to the United States, that the State statutes under which the officials were purporting to act were unconstitutional and void in so far as they imposed taxes on account of such gasoline so sold and delivered, and that the plaintiff had no adequate remedy at law for the protection of its constitutional rights (R. 1-21).

The defendants filed a motion to dismiss and also an answer in which the defendants asserted their right to collect the taxes with respect to the gasoline sold by plaintiff or withdrawn from storage by plaintiff for sale to the United States. Defendants also denied that the plaintiff did not have an adequate remedy at law (R. 70-73, 77-91).

Both an interlocutory and a permanent injunction were prayed for in the bill (R. 21) and a statutory three judge court, consisting of Circuit Judge Hutcheson and District Judges Ervin, and Kennamer, was convened as provided by Section 266 of the Judicial Code (28 U. S. C. A. Sec. 380) (R. 73). Upon the hearing of the prayer for an interlocutory injunction, it was agreed by all parties that, without plaintiff waiving its insistence on its application for an interlocutory injunction, this case might also be submitted for final decree upon the same testimony (R. 94).

The case was submitted upon an agreed statement of facts, together with a few additional affidavits (R. 94, 95).

At the hearing, the United States was granted permission to file and did file a brief as *amicus curiae* in opposition to the contention of the State that the plaintiff was liable for the excise taxes on account of the gasoline sold

or withdrawn from storage by it in Alabama for sale to the United States.

The District Court entered a decree on December 7, 1935 (Circuit Judge Hutcheson dissenting) restraining the defendants from collecting from plaintiff any taxes imposed by the gasoline excise tax statutes with respect to any gasoline sold or withdrawn from storage for sale to the United States in Alabama (R. 224, 225).

The District Court found the facts to be as stipulated by the parties and that more than Three Thousand Dollars ($3,000.00) was involved in the suit (R. 222).

The conclusions of law were:

(1) That under the Alabama statutes where gasoline was sold, the tax was measured by the amount of the sales and that the statutes were therefore unconstitutional and void, because contrary to the Constitution of the United States in so far as they impose an excise tax on account of or with respect to sales of gasoline to the United States measured by the number of gallons sold to the United States.

(2) That even should the statutes be treated as imposing a privilege tax measured by the quantity of gasoline withdrawn from storage for sale and delivery to the United States, the necessary effect would be the same as if the tax were measured by the quantity sold, as in both instances the price to the Government for such commodity would be increased by the amount of the tax and the tax burden in each case would necessarily and directly fall on the United States.

(3) That the plaintiff had no adequate remedy at law, because if it paid the taxes as they monthly matured, it would be under the necessity of instituting a multiplicity of suits to recover the payments. Failure to pay the taxes

subjected the taxpayer to a penalty of twenty-five per cent of the amount thereof, and a lien for the taxes and penalty attaches to the property of the taxpayer located in the State.

(4) That as final decree was being entered granting a permanent injunction, it was unnecessary for the Court to act separately on plaintiff's application for an interlocutory injunction (R. 222-223).

A written opinion by Judge Ervin, concurred in by Judge Kennamer, was also handed down, in which the Court amplified the facts stated in its conclusions of law as to the proper construction of the Alabama statutes and other applicable legal principles involved in the case (R. 226-233). Circuit Judge Hutcheson filed a dissenting opinion (R. 233-239.)

The defendants perfected a direct appeal to this Court as authorized by Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380).

(2) *Statement of the Facts.*

We summarize the facts as agreed upon by the parties, the plaintiff being referred to as "Company."

Company and its immediate predecessor in title and interest has been carrying on business in Alabama for more than fifteen years. It has a large investment in equipment and other property in the State and does business in every county (R. 110). The principal commodity sold by it in Alabama is gasoline, all of which is refined by it at Port Arthur, Texas, and then transported by barges to its terminals located near docks at Mobile, Alabama, Pensacola, Florida, or Millville, Florida. Gasoline from these terminals is not only distributed in Alabama but also in Florida, Georgia, Louisiana and Tennessee (R. 113).

The gasoline which the Company sells and delivers in Alabama to its customers is either delivered from its Mobile terminal or from one or more of its thirty-six bulk plants located in the State, or from retail service stations located therein. The bulk plants are located adjacent to railroad lines and when gasoline is shipped to them from one of the three above mentioned terminals by rail, it is unloaded into the storage tanks or other containers located on the bulk plant premises where it remains until it is withdrawn for delivery to customers who desire bulk plant delivery, or is withdrawn and conveyed to service stations where it is sold at retail to the public (R. 113, 114).

The gasoline which the Company sells in Alabama to the United States is either delivered from its terminal, Mobile, Alabama, or from its bulk plants in Alabama or from retail service stations either owned by it or handling its products. The gasoline which is delivered from the terminal at Mobile is gasoline which has been shipped by barge from Port Arthur, Texas and stored in the terminal where it remains until withdrawn for delivery to the United States, the delivery being in railroad tank cars on railroad tracks adjacent to the terminal (R. 116). The gasoline sold and delivered to the United States in Alabama from bulk stations is gasoline which has been shipped by railroad cars from one of the three terminals above mentioned to the bulk plants and there unloaded and stored until withdrawn for delivery to the Government (R. 117). The gasoline sold to the Government through the retail service stations has been shipped from the said terminals to the bulk plants and then taken from the bulk plants and placed in the service station tanks where it remains until sold and delivered to the United States (R. 117).

There are three kinds of service stations through which the Company makes deliveries to the Government:

(a) Service stations owned and operated by it.

(b) Service stations owned by others to which gasoline is delivered on consignment, the title remaining in the Company until deliveries are made to the Government.

(c) Independently operated stations where the Company sells the gasoline to the owner of the station who in turn makes deliveries to the United States. Deliveries made from this third class of service stations to the United States are for the account of the Company and are made pursuant to previous arrangements which the Company has made with the owners of such service stations and the Company bills the United States and collects the price for such gasoline directly from the United States (R. 114, 115).

Practically all of the gasoline received by the United States from the company is sold and delivered pursuant to previous written contracts between the parties. A number of typical contracts are attached as exhibits to the agreed statement of facts (R. 145, 167, 175, 194, 214). These contracts are negotiated by means of written bids tendered by the oil companies to the Government on forms prepared by the latter and cover, for a period of time, usually from three to nine months, all of the gasoline requirements of certain named departments of the Government in all or certain of the states designated in the contracts during the time stipulated. As to the sales and deliveries made by the Company in Alabama, some contracts specify deliveries at terminal, Mobile (R. 116), some bulk plant delivery (R. 117) and some service station delivery (R. 118). The price charged to the Government varies according to the delivery point, the deliveries at the terminal being the lowest and deliveries through retail service stations being the highest. The contracts heretofore entered into between the company and the United States were executed in the name

of the United States, and contained an agreement that the United States would pay for the gasoline purchased thereunder, and each contained one or both of the following provisions:

> "Bids must be submitted at definite prices per gallon, and shall be exclusive of state or municipal taxes. (See decision of the Supreme Court in the case of the *Panhandle Oil Company* v. *Mississippi*, May 14, 1928)" (R. 154).
>
> "Price to be paid for gasoline does not include state tax" (R. 170).

Invoices for the gasoline furnished under the contracts were required to be forwarded to a designated finance or disbursing officer of the United States who paid the same with Government funds. For example, the gasoline shipped from the terminal at Mobile under contract dated June 21, 1934 to the United States Army, Ft. McClellan, Alabama, was billed to the finance officer at that point and payment was made by him (R. 149).

Where the gasoline was sold through the bulk plants or retail service stations, the Government agent or employee receiving same gave a receipt to the Company and at the end of the month the Company forwarded these receipts to the Government disbursing officer and was paid the amount due for the gasoline so delivered (R. 117, 118, 119).

The United States has prepared a form which is used in all states and which is designated as Form 44—Exemption Certificate (R. 129). These forms are furnished to each Government agent or employee entitled to purchase gasoline for Government purposes (R. 121). In every instance where gasoline is sold in Alabama to the Government, one of these certificates is received from a Government officer, agent, or employee making the purchase or receiving the gasoline, describing the amount so purchased,

and is filed in the Company office where it is retained for inspection by the auditors of the State Tax Commission (R. 120).

The amount of gasoline which the Company had sold and delivered in Alabama to each department or agency of the United States during the approximate five year period preceding the filing of this suit is set out in Exhibit "2" attached to the agreed statement of facts (R. 128).

There were two contracts in effect with the United States for the sale and delivery of gasoline in Alabama to it by the Company at the time of the trial of this suit (R. 194, 214). The United States had requested under date of July 29, 1935 bids on tank car deliveries for Region No. 2 which covered Alabama and nine other States (R. 205); the deliveries to be made during the period from October 1 to December 31, 1935 (R. 202, 205). The Company on August 12, 1935 submitted a bid on a form prepared by the Government (R. 205). On August 13, 1935 the bids were publicly opened (R. 206). On September 27, 1935, the Treasury Department gave formal notice of its acceptance of the bid of the Company (R. 194). This contract called for the following estimated quantities of gasoline to be delivered from the Company terminal at Mobile:

54,325 gallons to Quartermaster United States Army, Ft. McClellan, Alabama.

47,840 gallons to Quartermaster United States Army, Maxwell Field, Alabama.

32,000 gallons to Tennessee Valley Authority, Wilson Dam, Alabama.

The price was seven cents per gallon where deliveries were made F. O. B. Mobile, Alabama, and approximately nine cents per gallon where deliveries were made F. O. B. destination (R. 214).

On September 18, 1935, the Company submitted a bid to the United States Department of Interior covering purchases for that department in Alabama for a period from October 1, 1935 to June 30, 1936 (R. 217). The bids were publicly opened on September 19, 1935 (R. 216). The contract was formally awarded to the Company on October 4, 1935 (R. 214). This contract calls for service station deliveries (R. 221).

(3) *History of the Gasoline Tax Statutes.*

All of the Alabama gasoline excise tax statutes levying taxes computed on a gallonage basis are set out in the record, (R. 3-9, 22-54), except the first act adopted in 1923 which is set out as Exhibit "A" in the Appendix to this brief.

The 1923 Act assessed a tax of two cents per gallon based only on sales. The Legislature of 1927 amended the act so as to impose the tax on every distributor, retail dealer or storer selling, distributing or withdrawing from storage gasoline in the State (R. 3). The Legislature also passed another act in 1927 very similar to the 1923 Act as amended imposing an additional tax of two cents per gallon (R. 22-26). An act similar to the two 1927 acts was adopted in 1931 imposing an additional gallonage tax of one cent (R. 26-31). An act similar to the other acts then in effect was adopted in 1932 imposing another one cent tax. This act added the word "refiner" to the other persons on whom the tax was levied (R. 31-36). In January, 1935, another act was adopted suspending or repealing the two acts last mentioned and imposing a tax of two cents in lieu of the two one cent levies contained in these acts (R. 37-44).

The Legislature adopted a general revenue act approved by the Governor on July 10, 1935, in which practically all of the revenue laws were incorporated as well as new provisions and repeal of prior acts in conflict therewith. All

the previously existing tax levies were repealed and in one portion or article of the new act designated as Schedule 156 a consolidated levy of six cents per gallon was enacted (R. 44-54). Schedule 156 was substantially the same in all respects here pertinent as the previous gasoline tax acts. The new act did purport to levy taxes on every distributor, refiner, retail dealer or storer of gasoline upon the selling, distributing, storing or withdrawing from storage, while the previous acts levied taxes upon the same persons engaged in selling, distributing or withdrawing from storage this commodity.

It will thus be noted that the rate of tax from the inception of the statutes imposing gallonage taxes was as follows:

From 1923 to 1927	2 cents.
From 1927 to 1931	4 cents.
From 1931 to 1932	5 cents.
From 1932 to the present	6 cents.

(4) *Administrative Interpretation of the Gasoline Tax Statutes.*

On March 22, 1923, the Attorney General of Alabama rendered an opinion to Joseph John, Assistant United States Attorney, Mobile, Alabama, holding that the sellers of gasoline in the State could not deduct or fail to pay the tax levied under the 1923 Act on sales made by them to the National Government (R. 91).

On August 22, 1928, the Attorney General of Alabama rendered an opinion to the State Tax Commission concerning the validity of the 1927 Acts as applied to sales to the United States. Both the 1927 Acts were adopted prior to the date of the decision of this Court in *Panhandle Oil Company* v. *Mississippi,* 277 U. S. 218, 72 L. Ed. 857 (May 1928). In this opinion of the Attorney General, it was held that the seller was not liable for any taxes on transactions with the United States imposed under the 1927 Acts (R. 54).

On November 22, 1928, following the decision in the *Panhandle* case, *supra*, the Attorney General of Alabama rendered an opinion to Hon. John G. Sargent, Attorney General of the United States, Washington, stating that on sales of motor fuels to the United States by dealers in Alabama, no tax was exacted and that where such tax had been paid in the past Alabama had no law by which a refund could be made (R. 58).

On July 14, 1933, the Attorney General of Alabama rendered an opinion to the State Forester that where gasoline was bought by the Government and used for governmental purposes, no tax could be collected under the statutes then in effect (R. 127).

On July 5, 1935, the Attorney General of Alabama rendered an opinion to the President of the State Tax Commission that the statutes did not levy a tax based on the sale of gasoline but upon the privilege of storing, which tax accrued upon and at the time of the withdrawal from storage and that whether the withdrawal is made for wholesale or retail trade or other use is immaterial. The conclusion was then reached in the opinion that the dealers in Alabama were liable for the taxes with respect to the gasoline sold and delivered by them in Alabama to the United States (R. 59-69).

From the date of the decision by this Court in the case of *Panhandle Oil Company* v. *Mississippi* (May 14, 1928) until June, 1935, none of the officials or representatives of the State made any claim that the Company was liable to the State for taxes with respect to the gasoline sold or withdrawn from storage by it for sale to the United States (R. 122).

Copies of all forms furnished by the State Tax Commission to the Company from 1930 to the date of trial in this case for the monthly reports of its gasoline transactions in the State are attached as exhibits to the agreed

statement of facts (R. 130-136). On most of the forms the taxpayer was required to list sales and withdrawals separately. The Company showed the amount of sales each month to the United States in separate columns and no tax was assessed with respect thereto. On all the forms in use since January, 1932, under the heading of instructions the following appears:

> "4. No credit will be allowed on sales to U. S. Government unless proof is submitted that such sales were for strictly Governmental Instrumentalities."

It has been the uniform practice since the passage of the Excise Tax Acts in 1927 for the Company and all other oil companies doing business in the State to omit reporting the gasoline sold or intended for sale until the time the title thereto passed from the companies to the purchasers and to omit reporting the gasoline withdrawn from storage for use other than sale until it was actually withdrawn for such other use. The State Tax Commission with knowledge of this practice has never prior to June, 1935, insisted that the transactions be reported in any other manner or the tax paid thereon in any different manner than as shown by such returns (R. 124).

The auditors of the State Tax Commission since prior to January 1, 1930, have audited the books of the Company at intervals of approximately three months and have examined each of the tax exemption certificates (Form 44) covering sales to the Government, but never made any claim prior to June, 1935, that the Company was liable for taxes with respect to the gasoline sold to the United States (R. 123).

From August 2, 1932, until March 11, 1935, the State Tax Commission in answer to inquiries from the Company and also by circulars on many occasions advised the Company that no taxes were due the State on gasoline sold

by it to the United States, but did advise that taxes were payable by independent dealers who bought their requirements in the State and thereafter sold same to the Government (R. 137-144).

The first time since 1928 that the Company was informed that the State intended to claim that it was liable for delinquent taxes on account of the gasoline which had been sold to the United States was when it received a telegram at its Atlanta office on June 17, 1935, from Thomas E. Skinner, Special Agent, State Tax Commission, reading as follows:

> "A thorough audit of your books discloses that you have withdrawn one million three hundred thousand gallons gasoline from Alabama storage on which excise tax has not been paid STOP Demand is hereby made on you for the payment of excise tax on this gasoline computed at the rate prescribed by law plus interest and penalty STOP Make check payable to undersigned and address reply to this office" (R. 12).

After receipt of this telegram the Company received a letter from the State Tax Commission dated July 9, 1935, advising that the Attorney General had rendered an opinion dated July 5, 1935, to the effect that gasoline sold to the United States could not be deducted from the taxable gallons sold or withdrawn from storage in Alabama but must bear the State tax of six cents a gallon, and also calling attention to the fact that as the lubricating oil tax law was worded almost exactly like the gasoline tax acts it was the opinion of the writer that the same ruling would apply to both gasoline and lubricating oil sales (R. 144, 145).

On August 30, 1935, the State Tax Commission wrote another letter to the Company that no deductions in taxes could be allowed from gasoline sales by reason of gallonage sold to the United States or Federal Agencies. The Company was requested to add to its August sales such deductions as it made in its return covering July sales and

to remit the tax along with the tax covering August sales on or before September 20. The Company was also advised that in preparing its returns in the future no allowance could be made by reason of sales to the Federal Government (R. 13, 14).

The Company after this suit was instituted received a letter from the State Tax Commission dated October 10, 1935, referring to the prior letter of August 30, 1935, stating that it had come to the knowledge of the writer that certain inferences or conclusions had been drawn from the previous letter not intended to be conveyed and stating that the Company was required to compute and pay the excise tax on the amount of gasoline stored in the State, measured by the amount withdrawn from storage, that the tax did not apply to shipments in interstate commerce, and that the Commission was not concerned with the use to which the gasoline is put after its withdrawal from storage (R. 85-86).

The defendants admit that they intend to follow the ruling of the Attorney General dated July 5, 1935 and to collect or attempt to collect the taxes with respect to the gasoline withdrawn from storage in Alabama and sold to the United States, unless they are enjoined or restrained from doing so by judicial order or decree (R. 113).

The Company was informed by the State Tax Commission prior to the institution of this suit that if the taxes were not paid on all sales or withdrawals for sale to the Government for a period of the preceding five years, a suit or suits would be instituted for their recovery and that the Company would be subjected to the penalties provided in the Gasoline Excise Tax Acts (R. 112).

The Company has paid all taxes purported to be levied by the gasoline statutes on gasoline handled by it except taxes with respect to withdrawals from storage for sale to the United States or with respect to sales to the United States since the decision in the *Panhandle Oil* case (R. 124).

Summary of the Argument.

I.

The statutory three judge court had jurisdiction. The plaintiff applied for an interlocutory and a permanent decree restraining the enforcement, operation or execution by certain officials of the State of Alabama of the State gasoline tax acts which levy excise taxes with respect to gasoline sold by plaintiff to the United States, on the ground that such statutes are unconstitutional and void because violative of the Federal Constitution. Application for interlocutory injunction was pressed. More than $3,000 is involved in the controversy.

Section 266 of the Judicial Code (U. S. C. A., Title 28, Sec. 380);

Sterling v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375;

Stratton v. *St. Louis Southwestern Railway Company*, 282 U. S. 10, 75 L. Ed. 135.

II.

The Texas Company was the proper party to sue and can maintain this suit, as it was required to report and pay the taxes to the State and liable for penalties in the event of failure to do so.

Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218, 72 L. Ed. 857.

Cummings v. *Merchants National Bank of Toledo*, 101 U. S. 153, 25 L. Ed. 903;

Hammer v. *Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101;

Pierce v. *Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070;

Buchanan v. *Warley*, 245 U. S. 60, 62 L. Ed. 149;

Truax v. *Raich*, 239 U. S. 33, 60 L. Ed. 131;

Savage v. *Jones*, 225 U. S. 501, 56 L. Ed. 1182;

Station WBT, Inc., v. *Poulnot*, 46 F. (2d) 671.

III.

The plaintiff did not have an adequate remedy at law.

(a) Payment of the gasoline taxes is required to be made monthly and unless suits for refunds are filed within sixty days from the date of the respective payments, they are barred, thus imposing on the plaintiff, in order to protect its legal rights, the necessity of instituting a multiplicity of suits involving the same issues of law.

Matthews v. *Rogers,* 284 U. S. 521, 76 L. Ed. 447;
Wilson v. *Illinois Southern Railway Company,* 263 U. S. 574, 68 L. Ed. 456;
Lee v. *Bickell,* 292 U. S. 415, 78 L. Ed. 1337;
American Airways v. *Wallace,* 57 F. (2d) 877.

(b) The tax refund statutes of 1927 and 1931 provided no remedy at law for taxpayers to recover taxes illegally collected by the State Tax Commission. The statutes also failed to provide for the payment of interest on the taxes refunded.

Hopkins v. *Southern California Telephone Company,* 275 U. S. 393, 72 L. Ed. 329;
Butler v. *Schulte,* 67 F. (2d) 632 (C. C. A. 5th);
Nutt v. *Ellerbe,* 56 F. (2d) 1058;
Proctor & Gamble Distributing Company v. *Sherman,* 2 F. (2d) 165.

(c) The tax refund statute of 1935 provides that the officials collecting illegal taxes shall not be individually liable therefor. The officials can be sued only in their official capacity. Such a suit is one against the State violative of Section 14 of the Alabama Constitution which provides that the State shall never be made a party defendant in a suit

at law or equity, which constitutional provision cannot be waived by the Legislature of Alabama.

Smith v. *Reeves,* 178 U. S. 436, 44 L. Ed. 1140;
Alabama Girls' Industrial School v. *Reynolds,* 143 Ala. 579, 42 So. 114;
Alabama Industrial School v. *Adler,* 144 Ala. 555, 42 So. 116;
White v. *Alabama Insane Hospital,* 138 Ala. 479, 35 So. 454.

(d) The revenue statute of 1935 restricted the taxpayer's right to sue to the State courts, which is not a sufficient remedy to the taxpayer, and such statute does not oust the jurisdiction of Federal equity courts of suits filed by a non-resident taxpayer where there is more than $3,000 involved.

City Bank Farmers Trust Company v. *Schnader,* 291 U. S. 24, 78 L. Ed. 628;
Southern Railway Company v. *Query,* 21 F. (2d) 333.

(e) The taxes payable to the State under the gasoline tax statutes are secured by a lien on all the property of the taxpayer located in the State superior to liens of all other parties.

Ohio Tax Cases, 232 U. S. 576, 58 L. Ed. 737.

(f) The taxpayer is subjected to penalties for failure to report and pay the tax as required by the statutes. The tax officials prior to the institution of this suit informed the plaintiff that the State would insist on the payment of such penalties (R. 7, 45, 112, 113).

Western Union Telegraph Company v. *Andrews,* 216 U. S. 165, 54 L. Ed. 430;
Raymond v. *Chicago Union Traction Company,* 207 U. S. 20, 52 L. Ed. 78.

IV.

The plaintiff had the right to maintain the bill for injunction as to both past and future transactions with the United States, as there was no adequate remedy at law by which plaintiff could protect its rights. An equity court has jurisdiction to decide all the issues involved in the controversy.

Western Union Telegraph Company v. *Andrews*, 216 U. S. 165, 54 L. Ed. 430;

Raymond v. *Chicago Union Traction Company*, 207 U. S. 20, 52 L. Ed. 78;

Louisville & Nashville Railroad Company v. *Greene*, 244 U. S. 522, 61 L. Ed. 1291;

Wilson v. *Illinois Southern Railway Company*, 263 U. S. 574, 68 L. Ed. 456;

Siler v. *Louisville & Nashville Railroad Company*, 213 U. S. 175, 53 L. Ed. 753;

Sterling v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375.

V.

The statutes impose an excise tax with respect to the gasoline sold measured by the quantity sold.

Opinion of Attorney General of Alabama, dated August 22, 1928 (R. 54);

Acts of Alabama Legislature (R. 3-8, 22-54).

VI.

An excise tax measured by the quantity of gasoline sold to the United States is a tax on the United States contrary to the Federal Constitution.

Panhandle Oil Corporation v. *State of Mississippi*, 277 U. S. 218, 72 L. Ed. 857;

Graysburg Oil Company v. *State of Texas*, 278 U. S. 582, 73 L. Ed. 519;

Indian Motocycle Company v. *United States*, 283 U. S. 570, 75 L. Ed. 1277.

VII.

A tax measured by the amount of gasoline withdrawn from storage for sale to the United States is a tax on a necessary and material ingredient of the sale and is, therefore, a tax on the United States contrary to the Federal Constitution.

See cases cited under Point VI, *supra*.

VIII.

A tax measured only by the amount of gasoline withdrawn from storage for use and which only accrues when the gasoline is withdrawn is not a tax for the privilege of storing, but is a tax for the privilege of withdrawing from storage for use.

Dawson v. *Kentucky Distilleries & Warehouse*, 255 U. S. 288, 65 L. Ed. 638;

Sheip v. *Amos*, 100 Fla. 863, 130 So. 699.

IX.

Taxes levied by the Alabama gasoline tax statutes are taxes on the consumer and are directly borne and paid by the consumer in the same form and to the same extent as imposed by such statutes.

Jefferson County v. *Hard*, 227 Ala. 201, 149 So. 81;

Gregg Dyeing Company v. *Query*, 286 U. S. 472, 76 L. Ed. 1232;

Monamotor Oil Company v. *Johnson*, 292 U. S. 85, 78 L. Ed. 1141;

See also abstracts of gasoline statutes in other States. (Exhibit C to Appendix to this brief).

X.

Official rulings of State Attorneys General as to the proper construction of ambiguous statutes when followed

for a long period of years by officials charged with the administration of such statutes prevent or estop the State from inflicting loss or penalties on a taxpayer where he, in good faith, has relied on such rulings and interpretations and has parted with his money or property on the strength thereof.

Dismuke v. *United States,* Manuscript, Advance Opinions L. Ed., Vol. 80—No. 8, page 375;

Indiana v. *Milk,* 11 Fed. 389;

Walker v. *U. S.,* 139 Fed. 409 (C. C. A., 5th, 148 Fed. 1092;

Curen v. *New York,* 79 N. Y. 511;

Philadelphia v. *Anderson,* 142 Pa. 357, 21 Atl. 976, 12 L. R. A. 751;

United States v. *Stinson,* 125 Fed. 907, 49 L. Ed. 724;

United States v. *Willamette,* 54 Fed. 807.

ARGUMENT.

I.

Jurisdiction.

(1) *A Three Judge Court Was Properly Convened.*

This was a case for the convening of a three judge court required by Section 266 of the Judicial Code (U. S. C. A., Title 28, Sec. 380). The plaintiff claimed that the Alabama gasoline excise tax statutes were unconstitutional and void because contrary to the Constitution of the United States (paragraph 10 of plaintiff's bill of complaint, R. 18, 19). None of these statutes have ever exempted taxes with respect to sales or with respect to withdrawals for sale of gasoline to the United States. While two State Attorneys General have rendered opinions that under the authority of the *Panhandle Oil* case, *supra,* the State could not collect

the gasoline taxes levied by the acts on transactions with the United States (R. 54-58, 126, 127), the present Attorney General has held the acts sufficiently broad to allow the taxation of such transactions (R. 59-69).

The principles announced by Mr. Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375, appear to be so applicable here that we quote from the opinion:

> "First. The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where State officials, purporting to act under State authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief. *Ex parte Young*, 209 U. S. 123, 155, 156, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 28 S. Ct. 441, 14 Ann. Cas. 764; *Home Teleph. & Teleg. Co.* v. *Los Angeles*, 227 U. S. 278, 292, 293, 46 L. Ed. 510, 516, 517, 33 S. Ct. 312; *Truax* v. *Raich*, 239 U. S. 33, 37, 38, 60 L. Ed. 131, 133, 134, L. R. A. 1916D, 545, 36 S. Ct. 7, Ann. Cas. 1917B, 283; *Cavanaugh* v. *Looney*, 248 U. S. 453, 456, 63 L. Ed. 354, 357, 39 S. Ct. 142; *Terrace* v. *Thompson*, 263 U. S. 197, 214, 68 L. Ed. 255, 274, 44 S. Ct. 15. The Governor of the State, in this respect, is in no different position from that of other State officials. See *Davis* v. *Gray*, 16 Wall. 203, 210, 233, 21 L. Ed. 447, 452, 457; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 76 L. Ed. 1155, 81 A. L. R. 1402, 52 S. Ct. 595; *Binford* v. *McLeaish*, 284 U. S. 598, 76 L. Ed. 513, 52 S. Ct. 207; (D. C.) 52 F. (2d) 151, 152; *Sproles* v. *Binford*, 286 U. S. 374, 76 L. Ed. 1167, 52 S. Ct. 581. Nor does the fact that it may appear that the State officer in such a case, while acting under color of State law, has exceeded the authority conferred by the State, deprive the court of jurisdiction. *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U. S. 239, 246, 76 L. Ed. 265, 272, 52 S. Ct. 133; *Fidelity & D. Co.* v. *Tafoya*, 270 U. S. 426, 434, 70 L. Ed. 664, 666, 46 S. Ct. 331.

"As the validity of provisions of the State constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 75 L. Ed. 135, 51 S. Ct. 8. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of State or Federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. *Silver* v. *Louisville & N. R. Co.*, 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 S. Ct. 451; *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 303, 58 L. Ed. 229, 238, 34 S. Ct. 48; *Davis* v. *Wallace*, 257 U. S. 478, 482, 66 L. Ed. 325, 328, 42 S. Ct. 164; *W. T. Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116, 71 L. Ed. 566, 568, 47 S. Ct. 271."

Both an application for an interlocutory and for a permanent injunction were made and pressed by plaintiff to restrain the enforcement of the State statutes (R. 21, 93-94, 222, 223).

Stratton v. *St. Louis Southwestern Railway Company*, 282 U. S. 10, 75 L. Ed. 135;
Sterling v. *Constantin, supra;*
Brucker v. *Fisher* (C. C. A., 6th), 49 F. (2d) 759.

(2) *Amount in Controversy.*

In the telegram of June 17, 1935 to plaintiff, demand was made by the special agent of the State Tax Commission for alleged taxes on 1,300,000 gallons of gasoline, plus interest and penalty (25%), which aggregated more than $100,000 (R. 12, 13).

In addition to the amount of taxes claimed as past due, it is shown by the record that the plaintiff had at the time of the trial entered into two contracts with the United States,

one contract to deliver 134,165 gallons of gasoline to the War Department and to the Tennessee Valley Authority during the last three months of 1935 (R. 214). The tax claimed by the State on this gallonage will amount to $8,049.90. Plaintiff had also entered into a contract with the Department of the Interior to supply its requirements in Alabama for a nine months' period beginning October 1, 1935 (R. 214-221). The Company had submitted bids on both these contracts to the Government prior to the filing of its bill.

The value of the right of the Company to do business with the United States in Alabama without any lawful interference by the State also measures the amount in controversy.

Berryman v. *Whitman College*, 222 U. S. 334, 56 L. Ed. 225;

Hunt v. *New York Cotton Exchange*, 205 U. S. 322, 51 L. Ed. 821;

Bitterman v. *L. & N. Railroad Company*, 207 U. S. 205, 52 L. Ed. 171;

Packard v. *Banton*, 264 U. S. 140, 68 L. Ed. [illegible].

(3) *The Texas Company can Maintain the Suit.*

Plaintiff is the party against which the State is making the claim for the taxes and although the taxes are in substance and effect taxes on the consumer and the plaintiff a conduit for collection, yet plaintiff is liable for the collection and is liable for the penalties for failure to collect and pay same to the State.

Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218, 72 L. Ed. 857;

Cummings v. *Merchants National Bank of Toledo*, 101 U. S. 153, 25 L. Ed. 903;

Hammer v. *Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101;

Pierce v. *Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070;
Buchanan v. *Warley*, 245 U. S. 60, 62 L. Ed. 149;
Truax v. *Raich*, 239 U. S. 33, 60 L. Ed. 131;
Savage v. *Jones*, 225 U. S. 501, 56 L. Ed. 1182;
Station WBT, Inc. v. *Poulnot*, 46 F. (2d) 671.

II.

Plaintiff Had No Adequate Remedy at Law.

Under the gasoline excise tax statutes in effect at the time this suit was filed and under the one which became effective October 1, 1935, persons dealing in gasoline were required to file a report with the State Tax Commission by the 20th of each month showing the amount of gasoline sold or withdrawn from storage during the preceding month and at the time of filing the report to pay the tax on account of the taxable transaction so reported (R. 45). For failure to file the report or pay the tax as provided, the taxpayer is subjected to a penalty of 25% of the amount of the tax (R. 52), and also for failure to make the reports as required, it is subjected to a fine of not less than $50 or more than $300 for each offense, each month of failure constituting a separate offense (R. 47).

The State Tax Commission is required under the act effective October 1, 1935, to immediately pay the gasoline taxes, when collected, to the State Treasurer and the State Treasurer is required by the 10th of the calendar month following the month of collection to distribute the proceeds of one-half of the taxes (3¢ of the 6¢ levy) equally among the sixty-seven counties of the State (R. 47). Pretermitting for the moment other considerations why Section 379 of the Revenue Act of 1935 set out in appellants' brief, page 28, did not afford plaintiff an adequate remedy at law, the fact that the statute requires a suit for refund to

be filed by the taxpayer within sixty days from the date of payment or else recovery is barred means that while plaintiff under the gasoline excise tax acts is required to pay taxes monthly, it would be under the necessity of instituting suits at maximum intervals of sixty days. To be safely within the sixty day statute, the taxpayer should institute a separate suit after each monthly payment. We quote the provision of the statute here relevant (Acts of 1935, page 568):

> "Whenever any taxpayer claims that any tax, except ad valorem taxes, herein levied, as fixed by the collecting officer is excessive or is invalid either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same shall note on the receipt that such tax was paid under protest. Within sixty days after such payment under protest, the taxpayer shall commence suit against the officer for the recovery of such amount as is claimed to be excessive or invalid, and unless such suit is commenced within such period of sixty days from such payment, such payment shall be deemed voluntary."

The attorneys for appellants in their brief say:

> "By pursuing the remedy afforded by the 1935 statute, appellant, on the bare possibility of having to file one or more additional suits to keep the statute of limitations from running, can recover any amount which is erroneously paid, with interest at the legal rate of 6%" (Appellants' brief, page 31).

Counsel state the case mildly when they say that there is a bare possibility of having to file one or more additional suits to keep the statute of limitations from running. The only court which can authoritatively settle the question as to the liability of oil companies for the payment of the Alabama taxes with respect to gasoline sold to the United States is this Honorable Court. Under the present

Attorney General's interpretation of the refund statute, suits for refund can only be filed in the State Court. (See Exhibit B in Appendix to this brief.) A refund suit would ordinarily be filed in the State Circuit Court and before it was finally decided by the Supreme Court of Alabama and by this Court, more than twelve months would very probably elapse, even though all the parties used due diligence in prosecuting the case through all the courts. In the interim, neither the State officials nor anyone else could waive the mandate of the statute that suits during the pendency of the final decision be filed every sixty days for refund of the tax payments made subsequent to the payments involved in the test suit. Granting that it might be decided that the Federal District Courts had jurisdiction for the recovery of illegal taxes under the refund statute where the jurisdictional amount is involved, it would probably require an equal period of time to secure a final determination of the question in a suit commenced in the Federal District Court.

But this is not all. The State Tax Commission is required, upon the receipt of the gasoline taxes, to pay them over to the State Treasurer who by the 10th of the following month is required to distribute one-half thereof to the sixty-seven counties. This is required by the gasoline tax statutes and also by Section 380 of the Revenue Act of 1935, notwithstanding the taxes are paid under protest. We quote Section 380 (General Acts of 1935, page 569):

> "Whenever any money for taxes paid to any officer authorized to receive or collect same is paid under protest, such officer shall distribute to the various governmental agencies the proportion due such governmental agencies in the manner and at the times provided in this Act, and at the time of such distribution, shall note the fact that such payment was made under protest, and the Treasurer or custodian of funds of such governmental agency, shall in giving his receipt

therefor, note that such tax was paid under protest. Any Tax Collector or other officer authorized to receive and collect taxes noting such fact, shall not be personally liable for such payments should such taxes ultimately be held illegal or excessive."

The attorneys for appellants appear to concede that the distribution of the taxes after their receipt by the State is mandatory, though the taxpayer protest at the time of payment. We quote from page 31 of their brief:

> "Under the statute above quoted, if it be a fact that the Treasurer of the State is required to distribute the portion of the tax appropriated to the counties, it would nevertheless be the duty of the counties, upon the case being adjudicated, to immediately refund that part of such tax received by the individual county."

Section 103 of the 1935 Alabama Revenue Act is set out on page 29 of appellants' brief and provides that where counties are paid taxes subsequently judicially declared to have been illegally exacted, upon the presentation by the taxpayer of a certified copy of the judgment of the court, they shall refund to the taxpayer the portion of the taxes received by them adjudged to have been wrongfully collected. This requires a presentation of a certified copy of every judgment to the officials in each of the sixty-seven counties in each case filed by the taxpayer for a refund, should the taxpayer be declared entitled to refund in the suits filed by it.

In any aspect in which the Texas Company was confronted prior to the institution of this suit, had it not filed a bill in equity for injunction against the State officials charged with the administration and enforcement of the tax statutes, it would have been under the necessity of instituting a multiplicity of suits involving the same parties and the same issues of law to protect and preserve its legal rights pending the final determination of the controverted

question of its liability for the taxes on transactions had by it with the Government. We quote from the opinion prepared by Mr. Justice Stone in *Matthews* v. *Rogers*, 284 U. S. 521, 76 L. Ed. 447:

> "In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties, involving the same issues of law or fact."

In *Wilson* v. *Illinois Southern Railway Company*, 263 U. S. 574, 68 L. Ed. 456, it was held that because a taxpayer had to sue in five counties, there was such a multiplicity of suits as to authorize that taxpayers resort to equity for an injunction restraining the collection of taxes claimed to be illegal. See also *Lee* v. *Bickell*, 292 U. S. 415, 78 L. Ed. 1337.

A statutory three judge court in *American Airways* v. *Wallace*, 57 F. (2d) 877, 879, held the refund statute of Tennessee not to afford an adequate remedy at law where it provided that suits for the recovery of excise taxes claimed to be illegal on those dealing in gasoline had to be instituted within thirty days from date of payment of the tax. We quote from the opinion:

> "In applying the test as to whether courts will entertain a suit in equity to enjoin the collection of a tax, the court must look to the probable consequences or damages resulting to plaintiff if the injunction is not granted. It is quite apparent that, from the facts averred in the petitions and admitted in the answers, if plaintiff is not liable for the tax, it does not have an adequate remedy at law, because the law provides for the payment of the tax monthly, on or before the 20th of each month succeeding the withdrawal, which may be paid under protest, and then the taxpayer has thirty days from date of payment, in which to bring suit for refund thereof. To force plaintiff to its remedy at

law would necessarily result in a multiplicity of suits, involving much expense in such items as attorney's fees, costs, etc."

The refunding statutes of 1935 are very probably void because violative of the Alabama Constitution as they authorize suits against the collecting officers only in their official capacities.

Section 14 of the Constitution of Alabama of 1901 is as follows:

> "That the State of Alabama shall never be made a defendant in any court of law or equity."

Section 380 of the 1935 Alabama Revenue Act, *supra*, provides that an officer collecting illegal taxes shall not be personally liable for such payments in suits instituted under the statute for refund. The party to be sued for the recovery of illegal taxes collected under the gasoline tax statutes as prescribed by the 1935 refund statutes is the State Tax Commission in its official capacity, even though the Commission is immediately required to pay over the funds collected to the State Treasurer who in turn distributes same to the counties and to the agencies of the State provided in the statutes. It is clear that such a suit would be a suit against the State. We quote from the opinion of this Court in *Smith* v. *Reeves*, 178 U. S. 436, 44 L. Ed. 1140 as follows:

> "We are clearly of opinion that within the meaning of the constitutional provisions relating to actions instituted by private persons against a state, this suit, though in form against an officer of the state, is against the state itself."

It is true that the legislature in some states can waive the immunity of the State to suit, but the Constitution of Alabama does not so authorize the Alabama Legislature. We

quote from *Alabama Girls' Industrial School* v. *Reynolds*, 143 Ala. 579, 42 So. 114:

> "The solution of this question depends upon whether it is immune against being a defendant to any action or suit by that provision of the Constitution which prohibits the state of Alabama from being made a defendant in any court of law or equity (section 14 of the Bill of Rights), notwithstanding the act of its incorporation contains an express authorization that it may be sued. If the suit instituted against it is practically and really against the state—if the judgment and decree obtained against it must be satisfied, if at all, out of the property held by it, and this property belongs to the state, though the title is *eo nomine* in the complainant as an agent of the state—then clearly to permit an action or suit against it would be doing by indirection that which cannot be done directly. In other words, if the complainant is a mere state agency—a representative of the state, instituted and maintained by the sovereignty for the exercise of a governmental function—a suit against it is a suit against the state, just as much so as the action by *Comer* v. *Bankhead*, reported in 70 Ala. 493, and *Smith* v. *Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140, where the relief sought was against the defendant, 'as Treasurer of the state of California,' to recover money paid to him as such officer. In that case the court said: 'Although the state, as such, is not made a party defendant, the suit is against one of its officers as Treasurer, the relief sought is a judgment against that officer in his official capacity, and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint, * * * The manifest purpose of section 14 of the Bill of Rights was to prohibit the legislature from passing any act authorizing the State to be sued in any court, and clearly any authorization to that end would be void because in violation of the constitutional provision."

We also quote from the opinion of the Alabama Supreme Court in *The Alabama Industrial School* v. *Adler*, 144 Ala. 555, 42 So. 116:

> "There is not only no law giving the court capacity to entertain the complaint against the defendant, but there is the section of the organic law of the state which prohibits such capacity. There is no provision in the Constitution by which the exemption of the state from suit may be waived. The legislature is without competency to enact a statute allowing the state to consent to a suit against itself, and it would seem that, if the law-making body has no power to enact a law granting such consent, certainly any action on the part of an attorney, a mere agent of the state, would be futile in that respect and as a waiver of the state's exemption from suit.—*Ex parte State*, 52 Ala. 231."

See also *White* v. *Alabama Insane Hospital*, 138 Ala. 479, 35 So. 454.

Conceding (though we think it a violent assumption in view of the above decisions) that the Supreme Court of Alabama would hold that the Legislature was authorized to waive the immunity of the State to suit, as it has impliedly attempted to do in Section 380, *supra* (the Alabama Supreme Court has not yet passed on this section), yet in view of the fact that such a suit would be one against the State and the Federal courts could not take jurisdiction, though the taxpayer as in this suit is a nonresident and the requisite amount in controversy is involved (*Smith* v. *Reeves*, *supra*), the statute would not offer an adequate remedy at law in the Federal court and could not therefore oust Federal equity jurisdiction.

It appears that under the provisions of Section 103 of the Revenue Act of 1935, where appeals are taken by a taxpayer from assessments fixed by the State Tax Commission, the appeals must be taken to the Circuit Court of Montgomery County, Alabama, or to the Circuit Court

of the county in which the taxpayer resides, if he has within the State a permanent residence. We quote a portion of the provisions of Section 103 not set out in the brief for appellants on page 29 and 30:

> "If any taxpayer against whom an assessment is made by the State Tax Commission under any assessment required by law to be made by the State Tax Commission, is dissatisfied with the final assessment as fixed by the said State Tax Commission, he may appeal from said final assessment to the Circuit Court of Montgomery County sitting in Equity, or, in cases other than public utilities, to the Circuit Court of the County in which the taxpayer resides if the taxpayer has within the State a permanent residence, at the option of the taxpayer, by filing notice of appeal with the Secretary of the State Tax Commission and with the Register of the Circuit Court of the County to which the appeal shall be taken within thirty days from the date of said final assessment."

Construing Sections 103 and 379 of the 1935 Revenue Act together, it would seem that the taxpayer is required to file suit for refund in the Circuit Court of Montgomery County, Alabama, if he has no permanent residence in the State. Consequently, the Texas Company, a nonresident, could only sue the State Tax Commission in the State Court of Montgomery County. In any event, the Supreme Court of Alabama has not construed these provisions, and their proper construction was and is a matter of great uncertainty and doubt. We quote from the opinion of this Court in *City Bank Farmers Trust Company* v. *Schnader,* 291 U. S. 24, 78 L. Ed. 628:

> "As the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, either as an original action or by removal, its existence cannot oust federal equity jurisdiction. *Smyth* v. *Ames,* 169 U. S.

466, 516, 42 L. Ed. 819, 538, 18 S. Ct. 418; *Chicago, B. & Q. R. Co.* v. *Osborne,* 265 U. S. 14, 16, 68 L. Ed. 878, 880, 44 S. Ct. 431; *Risty* v. *Chicago, R. I. & P. R. Co.,* 270 U. S. 378, 388, 70 L. Ed. 641, 650, 46 S. Ct. 236; *Matthews* v. *Rodgers, supra* (284 U. S. 526, 76 L. Ed. 452, 52 S. Ct. 217.)"

See also opinion of statutory three judge court in *Southern Railway Company* v. *Query,* 21 F. (2d) 333.

As it is a matter of public record, we think we can properly point out to this Court that in a case subsequently brought in the same District Court as the case at bar against the officials of the State Tax Commission in both their official and individual capacities for a refund of license taxes paid under protest, the Attorney General and other attorneys representing the State have filed pleas to the jurisdiction of the District Court, copies of which pleas are set out as Exhibit "B" to the Appendix to this brief.

Attorneys for appellants further contend that a sufficient remedy was provided by a statute adopted in 1927 (General Acts of Alabama 1927, page 635) quoted in appellants' brief on page 24, or by a statute adopted in 1931 (General Acts of Alabama 1931, page 527) set out in appellants' brief, page 26.

There are several reasons why the contention of appellants that either one or both of these statutes afforded the Texas Company a sufficient remedy at law is unsound:

(a) These statutes are very probably repealed by the 1935 General Revenue Act. In this Act, the Legislature attempted to consolidate or restate the tax laws and attempted to give a new kind of remedy for refunds of taxes illegally collected, as evidenced by the above described Sections 379 and 380 of the Revenue Act of 1935. The sixty-day limitation for the institution of suits for refunds and the machinery to be employed to secure such refunds is

entirely inconsistent with the remedies prescribed in either the 1927 or 1931 Acts.

(b) Both the 1927 and 1931 Revenue Acts were considered in the case of *Butler* v. *Schulte,* reported in 67 F. (2d) 632, and were held not to afford taxpayers an adequate remedy at law, as there was no provision for the refunding of interest on the tax payments. This case was tried in the District Court at Birmingham before our late Judge Grubb and his decision was sustained by the Circuit Court of Appeals, Fifth Circuit, in an opinion prepared by Circuit Judge Hutcheson. Judge Hutcheson, who dissented in the case at bar, did not place any ground of his dissent on the proposition that the plaintiff in this case had an adequate remedy at law under either the 1927, 1931 or 1935 Acts (R. 238).

As neither the 1927 nor the 1931 Acts permitted recovery of interest, it seems that the following statement of this Court in *Hopkins* v. *Southern California Telephone Company,* 275 U. S. 393, 72 L. Ed. 329, is applicable:

> "In no permitted proceeding at law could interest upon payments be recovered for the time necessary to obtain judgments. The county and sixteen municipalities were interested in the taxes demanded and if petitioners had received payments, it would have been incumbent upon them to make prompt distribution. Considering all the circumstances, we find no clear, adequate remedy at law. The equity proceeding was permissible."

See also

Nutt v. *Ellerbe,* 56 F. (2d) 1058, 1062;
Proctor & Gamble Distributing Company v. *Sherman,* 2 F. (2d) 165.

(c) The 1927 Act specifies no legal remedy to be employed, but provides that the taxpayer *may elect* to pay the

questioned taxes to the State Tax Commission pending the outcome of the controversy or litigation. It is not obligatory on the taxpayer to pay the taxes to the Commission. The statute applies as well to suits in equity as to those filed at law.

(d) The 1931 Act provides no remedy at law but merely prescribes that where a taxpayer under a mistake of law or fact has paid illegal taxes to the State Tax Commission, he can within one year from the date of payment apply to the Commission for a refund and if the Commission is satisfied that the refund should be made, it shall so certify to the State Auditor who draws his warrant for the amount to be refunded on the State Treasury. No appeal by the taxpayer is provided from a decision of the Tax Commission that the taxes were legally collected. In the last named event, the taxpayer is remediless as the State keeps the money where the finding of the Commission is adverse to the taxpayer. In the present case it would have been financial suicide for the taxpayer to have paid the taxes to the Tax Commission, as the Commission had already announced before the filing of this suit in letters to the Texas Company that it intended to follow the ruling of the Attorney General of Alabama of July 5, 1935, and collect the taxes with respect to the gasoline sold or withdrawn from storage for sale to the United States (R. 13, 85, 144). The agreed statement of facts also shows that the State officials intend to collect or attempt to collect such taxes unless enjoined or restrained from doing so by judicial order or decree (R. 113).

(e) The Supreme Court of Alabama has never to our knowledge held that either the 1927 or 1931 Acts afforded taxpayers an adequate remedy at law. That court has reviewed and considered cases on their merits originally instituted in the State Courts by complaining taxpayers

praying for an injunction to restrain the State Tax Commission from collecting excise or license taxes levied on gasoline dealers and other licenses levied on other parties. The jurisdiction of the equity courts seems to have been assumed, although this point does not appear from the opinions to have been raised in either case. These cases were instituted subsequent to either the 1927 or 1931 Acts or both.

Exchange Drug Company v. *State Tax Commission,* 218 Ala. 114, 117 So. 673;

Woco Pep Company of Montgomery v. *Butler Chairman of State Tax Commission,* 225 Ala. 256, 142 So. 509.

If the 1927 or 1931 statutes were plainly adequate to protect taxpayers where they were compelled to make illegal tax payments, there was no occasion for the Legislature of 1935 to set up new machinery for tax refunds, yet the attorneys for the appellants say that the purpose of the 1935 statute was to remove the threat of injunctive process. We quote from their brief, page 28, as follows:

> "The Legislature of Alabama by the General Revenue Act of 1935, Act #194, approved July 10, 1935 (General Acts 1935, page 256, *et seq.*), very carefully attempted to give a taxpayer, making an overpayment or a payment of taxes illegally exacted, adequate protection. In fact, we cannot but conclude that the statutes were written with the fixed purpose of removing the threat of injunctive process from the orderly administration of the tax statutes."

The Alabama Attorney General by letter dated November 22, 1928, advised the United States Attorney General that there was no provision in the statutes of Alabama providing for the refund of certain taxes erroneously paid and that none of the refunding statutes, in his opinion, applied to taxes paid under the gasoline tax acts (R. 59). This

letter was written more than a year after the so-called 1927 refund statute was adopted. On January 8, 1935, the State Tax Commission advised the Texas Company that there was no provision for refunds of taxes paid under the gasoline tax statutes (R. 142).

The cases decided by the Alabama Supreme Court, cited on page 24 of the brief for appellants, involved refunds of *ad valorem* taxes. The statutes of Alabama providing for the refund of *ad valorem* taxes erroneously paid have no application to refunds of excise taxes illegally demanded by the State Tax Commission. It is, therefore, respectfully submitted that none of these cases are in point.

The Supreme Court of Alabama has not passed on either the 1927, 1931 or 1935 tax refunding statutes. The most that can be said for the statutes or any of them is that it is uncertain that the Texas Company prior to the institution of this suit had a clear and adequate remedy at law. In this situation this Court has many times held that the taxpayer is warranted in resorting to equity rather than being forced to speculate or take the hazard of pursuing an uncharted or questionable course which in the end may avail him nothing, while in the interim the time limits fixed by the State are rapidly running against him.

Dawson v. *Kentucky Distilleries & Warehouse Company,* 255 U. S. 288, 65 L. Ed. 638;
Wallace v. *Hines,* 253 U. S. 66, 64 L. Ed. 782;
Shaffer v. *Carter,* 252 U. S. 37, 64 L. Ed. 445;
Union Pacific Railroad Company v. *Weld County,* 247 U. S. 282, 62 L. Ed. 1110;
Davis v. *Wakelee,* 156 U. S. 680, 39 L. Ed. 578.

It is very respectfully submitted that the finding of the District Court that the plaintiff had no adequate remedy at law (R. 223) is amply supported by the facts set out in the record.

III.

Equity Jurisdiction With Respect to Taxes on Future Deliveries of Gasoline under Contracts Between the Texas Company and the United States.

Both the right of the Company to contract in the future with the United States for the sale and delivery of gasoline by it to the Government and the amount of taxes with respect to the gasoline involved in the contracts in effect between these parties when the case was tried involved more than $3,000.

There were two contracts between the Company and the United States for future deliveries in effect, one to supply from the Company's terminal at Mobile for three months the United States Army with its requirements at Ft. McClellan and at Maxwell Field, Montgomery, Alabama, and also to supply to the Tennessee Valley Authority at Wilson Dam, Alabama, a specified quantity, and the other to supply for a period of nine months through service stations the Department of the Interior (R. 126). The first contract was signed by H. C. Maull, Jr., Chief, Purchasing Division of the Treasury Department (R. 195) and the second was signed by W. B. Fry, Purchasing Officer, United States Department of Interior (R. 216). The United States was obligated under these contracts and no one but the United States agreed to pay for the gasoline purchased thereunder. The contracts explicitly stated for what departments of the United States the gasoline was purchased, viz: the War Department, Tennessee Valley Authority, Bureau of Reclamation, the Administrative Division, Public Works Administration and other Interior Department activities. The State in this case has not pleaded or contended that any of the Federal departments to be supplied were invalidly or unconstitutionally created, or that the United States offi-

cials in entering into the contracts were acting outside the scope of their duties.

The decree of the lower court strictly limited its injunction to gasoline transactions by the Texas Company *with the United States.* By the terms of the decree the defendants were enjoined from collecting any of the gasoline taxes from the Texas Company "measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States or withdrawn from storage and which is sold and delivered to the United States by it or for its account under contracts between it and the United States" (R. 224).

The attorneys for appellants, however, contend in accordance with the views expressed by Circuit Judge Hutcheson in his dissenting opinion that injunction should not be issued as to any future transactions between the Texas Company and the United States, because it would be of a supervisory nature and because (quoting from Judge Hutcheson's opinion):

> "What the State may not, neither may the Government, do. If the establishment of departments of liquor control, as in the South Carolina and Ohio cases, and the operation of a railroad, as in *Helvering* v. *Powers*, are not the exercise by the State of ordinary and usual governmental functions within the principle of exemption from Federal taxation, it would seem probable that some of the agencies which plaintiff's gasoline will activate will not be within the principle of exemption from State tax" (R. 239).

It is respectfully submitted that the departments of the Government to which gasoline was to be supplied under the contracts in effect at the time of the trial were departments within the principle of exemption from State tax. If the Texas Company is not liable to the State on account of the gasoline it delivers to these departments of the United States, then it is respectfully submitted that the Company

was entitled to an injunction restraining the State officials from carrying out their announced intentions to collect the tax, regardless of whether the court should have enjoined the defendants with reference to any other future gasoline transactions which the Company might have with the United States.

In another phase of the argument, attorneys for appellants contend that the Company was not entitled to maintain an equitable action for injunctions as to past transactions. If a taxpayer cannot ask for relief either as to past transactions or as to future transactions in which a tax liability is claimed, then it necessarily follows that it can never maintain a suit in equity even though it has no plain or adequate remedy at law.

Typical contracts under which the deliveries had been completed to the United States prior to the institution of this suit and the name of each department or agency to which deliveries were made are fully set out in the record (R. 128). The departments of the United States to which deliveries were to be made or will be made in the future are also fully set out in the record. Neither the dissenting opinion nor the brief for appellants points out a single department which is not within the principle of exemption from State tax. The State does mention in its brief that immunity was claimed as to certain of the gasoline sold to the Department of Agriculture and that a part of such gasoline may have gone to the Agricultural Adjustment Administration, which activity was held by this Court to be beyond the constitutional powers of the United States (Brief, page 33). However, unless the State plead on the trial below that some of the departments of the United States for which the United States had bought gasoline, were beyond the constitutional powers of the Government and therefore invalid, we respectfully submit that the State

is not now in a position to contend in this Court that some of the departments (which are unnamed) may be unconstitutionally created or exercising extra constitutional functions.

As we further understand the views expressed in Judge Hutcheson's dissenting opinion and some of the contentions advanced by attorneys for appellants, they are to the effect that while certain agencies or departments of the United States may be constitutionally created by the United States, the United States is powerless to clothe them with immunity from State taxation. This theory is apparently derived from the holdings of this Court in *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; and *Helvering* v. *Powers*, 292 U. S. 620. As Judge Hutcheson expresses it: "What the State may not, neither may the Government, do" (R. 239).

The distinction between the total immunity of the United States from State taxation and the right of the United States to tax undertakings of a private nature engaged in by the State rests on differences in the powers vested in and exercised by each sovereignty. The United States is a government of limited and enumerated powers. It is, however, supreme when it constitutionally exercises any of the powers either expressly or impliedly granted to it by the State. The States have ceded this supremacy to the National Government. The sovereignty of the United States in its limited sphere is paramount and is immune from all efforts by the State to hamper or burden it in the exercise of these powers by taxation or otherwise. Of necessity the Federal Government cannot engage in functions of a non-governmental character.

A State by virtue of its reserved sovereignty may engage in private undertakings and when it does it subjects itself to certain liabilities, including the right of the Federal

Government to levy the same species of taxation on such private enterprise as the Federal Government could levy on individuals carrying on a like business.

We respectfully submit that since *McCulloch* v. *Maryland,* 4 Wheat. 316, 4 L. Ed. 579, this Court has consistently held that the United States with respect to all the functions which it constitutionally exercises, is totally immune from taxation by the States.

In denying the power of the State of Ohio to tax the Bank of the United States in *Osborn* v. *Bank of United States,* 9 Wheat. 738, 6 L. Ed. 204, this Court said:

> "The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. * * * The operations of the Bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services."

In *Smith* v. *Kansas City Title and Trust Company,* 255 U. S. 180, 65 L. Ed. 577, it was stated:

> "Deciding, as we do, that these institutions have been created by Congress within the exercise of its legitimate authority, we think the power to make the securities here involved tax exempt necessarily follows."

In the *State of Alabama* v. *United States,* 38 F. (2d) 897, in which the State of Alabama claimed the right to tax the sale of surplus power manufactured by the Government at Muscle Shoals, the Court of Claims said:

"The United States is a government of limited and enumerated powers. There is no specially granted or implied power to engage in private business as such. In selecting the means to carry out and perform its constitutional powers the government may invade the field of what is called private business, and to the extent that it does it is performing what it can only perform—a public function. A State by reason of its original and reserved sovereignty may engage as a separate personality or corporation in what is called 'private business,' and thus subject itself to certain liabilities. But when the United States enters the field of so-called private business even as a separate personality or corporation, in order to effectuate certain of its granted powers, its action in so doing is a public act and it is not liable to be treated as a private individual and be subjected to taxation as such. *Clallam County* v. *United States, supra.* The court in that case said: 'The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends.' That is to say, it could invade the domain of private business in the form of a private corporation for its own convenience and to carry out its own ends, yet it would not be conducting business in a private capacity but as a governmental agency and so be exempt from taxation."

This case was subsequently dismissed by this Court for lack of original jurisdiction by the Court of Claims, *Alabama* v. *United States,* 282 U. S. 502, 75 L. Ed. 492, but the holding of the Court of Claims on the merits was not disapproved by this Court. In the opinion prepared by Mr. Justice Holmes, it is stated:

"If the claim is valid, which we are far from implying, it is under the State's original powers as such, and the only bearing of the Constitution is that it did not take the power away."

We also quote from *Willoughby on the Constitution of the United States,* Vol. 1, Second Edition, pages 144 and 145, as follows:

> "That a State may not, in the exercise of its reserved powers, interfere with a Federal governmental agency was settled once for all by the decision of the Supreme Court in *McCulloch* v. *Maryland.* This case was all the stronger in that the Federal agency, with whose activity it was alleged that Maryland had attempted to interfere by taxing it, was an agency neither essential to the National Government nor expressly provided for by the Constitution. The power to establish a National bank was at most only an implied one, and, in fact, its constitutionality was very widely denied, and, years after this, a bill providing for the establishment by the National Government of a similar institution was vetoed by President Jackson upon the ground of its unconstitutionality. But in this case Maryland had not only denied the constitutionality of the bank but had taken the position that, even were it constitutional, she had, under the general power reserved to her of taxing all occupations carried on within her territorial limits, the right to tax such branches of the bank as might be located within her borders. Thus, in this case, the State of Maryland did not claim that she might directly and deliberately interfere with the operation of a Federal law, but that the exercise by her of an otherwise legitimate authority could not be declared unconstitutional simply upon the ground that, indirectly, or by remote possibility, its effect was, or might be, to interfere with the exercise of a legitimate Federal power. In other words, the State took the ground that, while acting within their reserved spheres of authority, the States were as independent and sovereign as was the Union while operating within its constitutional sphere; and that, therefore, their direct interests, within such spheres, might not properly be subordinated to the merely indirect interests of the Union. This position the Supreme Court declared an invalid one."

Certainly some of the departments of the United States, such as the War Department, which were to be supplied under the contracts at the time of the trial come within the principle of immunity from State taxation and to this extent at least the bill presented a case by equitable jurisdiction.

The fact that the Texas Company endeavored to give the District Court all the facts in its possession relative to its gasoline contracts with the United States, including the amount of gasoline to be delivered to each Federal department and the method of handling each of the transactions, should not we respectfully submit operate to penalize the plaintiff in the granting of any equitable relief to which it might be entitled as shown by the facts in this case. A separate suit could have been filed as to each Federal department to be furnished with gasoline, or as to each contract for future delivery entered into with the United States, but this we with deference submit is not the proper procedure by which to get the single controverted question as to tax liability legally decided.

IV.

Plaintiff's Right to Maintain the Bill in Equity as to Taxes Claimed by the State on Past Transactions.

Attorneys for appellants argue that in no event should the District Court have enjoined the State officials from collecting the taxes with respect to transactions consummated prior to the filing of the bill (Appellants' Brief, pages 19-23). The apparent position of the attorneys is that the Texas Company is compelled to wait until the State institutes an action at law for the delinquent taxes and then interpose its legal defenses in such action.

When the bill in equity in the case at bar was filed, no suit was pending against the Texas Company to recover

the alleged delinquent taxes, nor had one at any previous time based on such claim been instituted. Demand had been made on the Company by the State Tax Commission for the taxes claimed to be delinquent and the penalties and interest (R. 12). The Company was also informed before the present suit was filed that if the taxes were not paid on all gasoline withdrawn by it from storage and sold to the United States during the last preceding five years, a suit or suits would be instituted against it and that it would be subjected to penalties provided by the gasoline excise tax acts (R. 112). The officials also declared that they intended to collect or attempt to collect all the taxes held under the opinion of the Attorney General, dated July 5, 1935, to be imposed on the Company, unless they were enjoined or restrained from doing so by judicial order or decree (R. 113).

In this situation, the Company could not safely pay the large amount claimed, plus interest and penalties, to the State and at the same time protect its legal rights, as if it paid the amount demanded there was no certainty that it could recover from the State the amount so paid. It is probable that the only statutes applicable to refunds of taxes which accrued prior to October 1, 1935 (the effective date of the 1935 revenue statute), were the 1927 and 1931 statutes relating to refunds. Irrespective of whether it is contended that the 1927, the 1931 or the 1935 Act would apply to taxes paid prior to October 1, 1935, we think for the reasons already discussed above that neither statute afforded taxpayers an adequate and certain remedy for the recovery of illegal taxes paid under protest. The penalties were demanded by the State on the past transactions and certainly there is nothing in either the 1927 or 1931 statutes indicating that repayment of any penalties could be made on account of delinquencies in tax payments.

If the Company had waited until the State made the next move, it is uncertain which procedure the State might have employed in its efforts to collect the tax. The agreed statement of facts states that the Company was informed by the State officials that a suit or suits would be instituted, but the character of these suits is not stated nor did the State agree to withhold any summary remedy it might have. The gasoline tax statutes provide that the taxes levied by the acts, together with the penalties for failure to pay same, are secured by a lien on all the property of the taxpayer located in the State superior to all other liens except tax liens to the State antecedent in date (R. 42, 52). The acts also provide that if the taxpayer fails after ten days' notice from the State Tax Commission to appear before it and show cause why taxes held delinquent by the Commission should not be paid, a summary execution could be placed in the hands of any sheriff in the State for execution in the manner provided for executions issued from a court of record (R. 52), or the sheriff could proceed in the same manner provided by law for the collection of delinquent taxes by County Tax Collectors (R. 41). Section 6 of an Act adopted in 1932 (General Acts of 1932, page 57) provides that if gasoline dealers do not pay all the taxes levied on them for the carrying on of such business, the State Tax Commission may revoke their license to deal in gasoline in the State (R. 17).

This Court has on many occasions held that State officials may be enjoined from taking steps to collect illegal taxes claimed by the officials to be delinquent where the taxpayer has no adequate remedy at law to protect his rights, and where the facts show that the complaining taxpayer might likely or probably sustain injury if an injunction is not granted.

There does not seem to be any distinction between enjoining the collection of illegal taxes to accrue in the future

and enjoining the collection of illegal taxes already accrued where the taxpayer has no adequate remedy by which he can protect himself. Of course, if the disputed tax is already in process of litigation which will determine the rights of the parties, equity courts will not entertain a suit to determine the same legal issues involved in the pending suit. We respectfully call the Court's attention to the following cases holding that taxpayers have the right to enjoin tax officials from collecting delinquent taxes claimed by the taxpayers to be illegal. We quote the following language in *Western Union Telegraph Company* v. *Andrews*, 216 U. S. 165, 54 L. Ed. 430:

> " 'The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.'
>
> "This doctrine is precisely applicable to the case at bar. The statute specifically charges the prosecuting attorneys with the duty of bringing actions to recover the penalties. It is averred in the bill, and admitted by the demurrer, that they threatened and were about to commence proceedings for that purpose. The unconstitutionality of the act is averred, and relief is sought against its enforcement. As this case is ruled, upon the question of jurisdiction, by the case of Ex parte Young, it is unnecessary to consider the question further. Upon the authority of that case the decree of the Circuit Court dismissing the bill for want of jurisdiction is reversed, and the cause remanded for further proceedings."

In the *Ohio Tax* cases, 232 U. S. 576, 58 L. Ed. 737, this Court said:

> "The right to invoke the equity jurisdiction is clear; for the act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of these actions (Sec. 117 of act; Sec. 5506, Gen. Code); and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the act."

We also quote from *Terrace* v. *Thompson*, 263 U. S. 197, 68 L. Ed. 255:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity."

See also

Raymond et al. v. *Chicago Union Traction Company*, 207 U. S. 20, 52 L. Ed. 78;

Louisville & Nashville Railroad Company v. *Greene*, 244 U. S. 522, 61 L. Ed. 1291;

Wilson v. *Illinois Southern Railway Company*, 263 U. S. 574, 68 L. Ed. 456.

Aside from other considerations, if this Court has jurisdiction it extends to every question involved. We again

quote a part of the opinion in *Sterling* v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375, as follows.

> "The jurisdiction of the District Court, so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 S. Ct. 451; *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 303, 58 L. Ed. 229, 238, 34 S. Ct. 48; *Davis* v. *Wallace*, 257 U. S. 478, 482, 66 L Ed. 325, 328, 42 S. Ct. 164; *W. T. Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116, 71 L. Ed. 566, 568, 47 S. Ct. 271."

It would, we respectfully submit, have been an anomaly for the District Court, after concluding that there was no liability by the Company with respect to any of the gasoline involved in its transactions with the Federal Government, to have only enjoined the State officials from collecting taxes on future transactions and to have left them free rein to institute such proceedings as they might decide to pursue with respect to the gasoline already sold and delivered to the United States. Equity does not grant relief piecemeal, but having assumed jurisdiction it endeavors to dispose of all the controverted issues.

After all we cannot see that it is a matter of much practical importance to the State to have the future transactions decided in one suit and the past transactions in another. If this Court should pass only on the future transactions, we suppose its decision will materially influence the State in concluding what course it will pursue as to the transactions completed prior to the institution of this suit.

As we see it, the same legal questions are involved in both the prior and subsequent transactions, except that as to the transactions consummated prior to the Attorney

General's last opinion of July 5, 1935, it is believed that the Company occupies an additional strong ground in that the State cannot now repudiate the assurances given the Company and other taxpayers similarly situated, both through official rulings of its two former Attorneys General and by letters and rulings of the State Tax Commission, that there were no taxes due under the gasoline tax statutes with respect to the gasoline sold and delivered by the Company to the United States.

THE MERITS.

V.

The Alabama Gasoline Tax Statutes Impose an Excise Tax for the Privilege of Selling, Distributing or Withdrawing from Storage Gasoline and as to the Gasoline Sold the Tax is Measured Exclusively by the Number of Gallons Sold.

(1) *History of the Alabama Gasoline Tax Statutes.*

Appellants contend that the tax statutes with respect to the gasoline sold and delivered in Alabama by the Company, including that gasoline sold and delivered by it to the Government, impose a tax upon the privilege of storing, which tax accrues upon and is measured by the amount of gasoline withdrawn from such storage (Appellants' Brief, page 33). It is the position of appellee, in accordance with the holding of the District Court, that as to the gasoline sold by the Texas Company and other dealers similarly situated, the tax levied by the statutes is measured exclusively by and is based upon the sales and accrues as the sales are consummated.

In view of the wide variance of the parties as to the proper interpretation of the acts, the task devolves upon

this Honorable Court to construe the acts, provided the highest courts of Alabama have rendered no authoritative decision construing the statutory provisions involved in this case.

Siler v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753.

As we are of the conviction that the Alabama Supreme Court has not rendered such a determinative decision, it is thought a brief resume of the statutes will be of assistance in arriving at the intent and proper construction of the same.

The first statute imposing gallonage taxes on the business of dealing in gasoline was that adopted in 1923 (Exhibit A of Appendix to this brief), levying a tax of two cents per gallon based solely on the number of gallons sold. The tax was required to be paid by every "distributor" and "retail dealer" and the parties coming under these classifications were defined in Section 1 of the Act as follows:

> "The term "distributor" shall include any person who shall engage in the selling of gasoline as herein defined in this State by wholesale in domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The term "retail dealer" shall include any person herein defined as "distributor" who is also engaged in the sale of gasoline as herein defined, at any place in this State, in broken quantities."

All the subsequent gasoline tax statutes have defined these words, where used therein, in exactly the same or substantially the same manner:

Section 1, First 1927 Act. (R. 22);
Section 2, Second 1927 Act. (R. 3);
Section 1, 1931 Act. (R. 26);

Section 1, 1932 Act. (R. 32);
Section 1, First 1935 Act. (R. 37);
Schedule 156, General Revenue Act of 1935. (R. 54).

The Act of 1923 had been interpreted by the Attorney General of Alabama as levying a valid tax with respect to sales by gasoline dealers to the United States (R. 91). This Act was in effect and the taxes were being collected on sales to the Government in accordance with the ruling of the Attorney General when the Legislature adopted the two 1927 Acts. The *Panhandle* case had not been decided by this Court, the date of the decision being May 14, 1928.

Aside from doubling the tax rate from two to four cents per gallon, what could have been the factors influencing the Legislature in 1927 in changing the phraseology of the 1923 Act from an excise based on sales alone to an excise based on "selling, distributing, or withdrawing (gasoline) from storage for any use"? It certainly could not have been for the purpose of taxing gasoline which was sold and delivered in the State to the Federal Government, because, as just pointed out, the State was already collecting taxes with respect to such transactions.

The answer to the question is the State desired to tax those domestic consumers who were bringing gasoline into the State and storing it until needed by them, thus avoiding the payment of the tax levied by the 1923 Act. A large source of revenue was escaping the State by the method followed by such consumers. This problem had been presented in other States and the Legislature of Alabama in casting about for a suitable method by which to plug the loophole in the 1923 Act came across the 1925 statute of the neighboring State of Tennessee which appeared to successfully solve the problem. The Alabama Legislature thereupon adopted the two statutes of 1927 which were modeled very closely after the Tennessee statute, the lan-

guage in the Alabama Acts being strikingly similar in all respects here important to the provisions contained in the Tennessee statute. A portion of the 1925 Tennessee statute is set out by the Supreme Court of that State in *Foster & Creighton Co.* v. *Graham*, 154 Tenn. 412, 285 S. W. 570, 47 A. L. R. 976. The attorneys for appellants state the facts as to the adoption by the Legislature of Alabama of the Tennessee statute as follows:

> "The language used in the Alabama statutes was taken almost literally from the gasoline excise tax levied by the laws of Tennessee of 1925, and as subsequently amended. These statutes of Tennessee contained, as does every statute of the State of Alabama enacted since 1927, the express legislative declaration that 'the tax imposed by this Act shall apply to persons, firms or corporations, dealers or distributors, storing any of the products mentioned in this act, and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawal be for sale or other use.'"

The purpose of the Legislature of Tennessee in amending its 1923 Act, which levied a tax as did the 1923 Alabama statute measured only by sales, is clearly related by the Supreme Court of Tennessee in *Foster & Creighton Co.* v. *Graham, supra,* in the following language:

> "It will be seen that the Act of 1923 imposed a tax on 'dealers,' and measured it by the quantity of gasoline 'sold or distributed' by them, and the term 'dealer' was defined as one engaged in the business of 'distributing or selling gasoline.'
>
> "The Act of 1925 extended the scope of the Act of 1923 so as to include, not only those engaged in selling gasoline, but also those engaged in storing it, and then withdrawing it for sale or other use.
>
> "The original act expressly excluded from its operation gasoline while it was in interstate commerce

(Sec. 2). All other gasoline, when sold or distributed, was included in the calculation of the tax.

"We think the effect of the amendatory Act of 1925, when properly interpreted, is to reach gasoline that is stored and thereafter withdrawn and used without being sold by any person, etc.

"Under the Act of 1923, a large consumer of gasoline, desiring to escape the tax levied by the act, could do so by buying his gasoline in quantities, say in tank lots, storing it, thereafter withdrawing it, and using it as needed. In such case there would be no intrastate sale or distribution within the meaning of said act, and such consumer would not, therefore, be subject to the tax.

"It was manifestly the purpose of the legislature in passing the amendatory act to cut off this avenue through which large consumers might evade the tax.

"We think the act, when properly interpreted, not only applies to distributors and dealers in gasoline, but applies to consumers who purchase gasoline in intrastate commerce and store it, and thereafter distribute the same, or allow the same to be withdrawn from storage, whether such withdrawal be for sale or other use."

It is so clear as to be beyond argument that the Legislature of Tennessee in passing the 1925 statute did not abrogate the tax previously in effect on gasoline measured by sales where the commodity was sold. It added a tax, namely, that on withdrawing gasoline from storage so as to tax the domestic consumers who brought into Tennessee and stored the gasoline needed to fulfill their respective requirements.

The problem that confronted the Legislatures of Tennessee and Alabama has been encountered and successfully coped with in other States. This Court in *Gregg Dyeing Company* v. *Query*, 286 U. S. 472, 76 L. Ed. 1232, 84 A. L. R. 831, quoted from the opinion of the South Carolina Su-

preme Court in the same case, which showed the tax there involved was a complementary tax enacted to tax consumers bringing into the State of South Carolina their own requirements and storing them for their own account. The State of South Carolina retained its original tax applying to dealers in gasoline. We quote from the *Gregg Dyeing Company* case as follows:

> "In South Carolina, commencing about a decade ago, the General Assembly expressed its public policy as to revenue to be derived from the use of gasoline, vol. 32, Stat. at L., p. 835. The tax then imposed was two cents a gallon. In 1925, the tax was increased to five cents, and in 1929, to six cents on the gallon. These statutes, however, only reached 'dealers' in this commodity. * * *
>
> "Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user, as will be hereafter shown. Realizing that large users of gasoline either were evading or would evade the payment of the tax imposed under these Acts, by bringing in gasoline in quantities from without the State, and storing it for their own purposes, the Legislature of 1930 enacted the statute under consideration, applying the six cents tax to every person, firm, corporation, municipality or any subdivision subject to its terms. * * * Thus, with the Act of 1930 complementing the other statutes referred to, all consumers of gasoline in South Carolina pay a tax of six cents per gallon, no matter what the origin of, or State in which, the gasoline is produced."

The Supreme Court of Tennessee had construed the 1925 Tennessee Act in *Foster & Creighton Co.* v. *Graham, supra,* many months before the adoption by Alabama of the 1927 Acts, the date of the decision in this case being July 3, 1926. It is elementary that when a State adopts a statute of another State which has already been construed by the highest courts in the State of original adoption, it is the

intent to adopt the statute as construed by the courts of the first State enacting the measure, in the absence of any evidence to the contrary.

The attorneys for the State are apparently construing the decision by this Court in *N., C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 77 L. Ed. 730, as holding that the 1925 Tennessee statute imposed only a "storage" or "withdrawal from storage" tax on gasoline sold by dealers or distributors in that State to their customers and that by analogy the same interpretation must be placed on the Alabama statutes. The attorneys for appellants in speaking of the effect of the holding by this Court in the *N., C. & St. L. R. Co.* case say:

> "It is submitted, however, that this is a clear recognition by this Court that the Tennessee statute meant just what the legislative declaration said it did—that the tax was a tax upon the storage and withdrawal from storage of gasoline within the State and not otherwise. In this regard the statutes of Tennessee are identical with the statutes of Alabama here involved" (Brief of Appellants, p. 47).

As we conceive it, the conclusion reached by the attorneys ignores the facts involved in the *N., C. & St. L. R. Co.* case. As stated by Mr. Justice Stone, the appellant was a rail carrier purchasing gasoline without the State and thereafter bringing it into the State and placing same in its own tanks. None of the gasoline was sold but was withdrawn as needed for use as motive power in the carrier's interstate railway operations (page 265 of 288 U. S.). Of course, *this* gasoline was subject to the tax measured by storage or withdrawals from storage. This was the very situation the Tennessee Legislature successfully sought to meet when it amended the 1923 Act in 1925. We find nothing in this Court's opinion tending to indicate that the tax with respect to gasoline *sold* by dealers in Tennessee was

measured by storage or withdrawals from storage rather than by the amount sold. We do not think this Court intended to change, limit or modify the holding of the Tennessee Supreme Court in *Foster & Creighton Co.* v. *Graham, supra,* as that case is cited by this Court in support of its holding. If anything, this Court seems to recognize there was a tax on the business of selling, as well as on the business of storing or withdrawing from storage. We quote from the opinion of this Court:

> "Chapter 58, Tennessee Public Acts, 1923, as amended by chapter 67, Tennessee Public Acts, 1925, is said, by its caption, to impose a privilege tax 'on persons * * * and corporations engaged in or carrying on the business * * * of *selling* or storing or distributing gasoline * * *,' within the state at the rate of 2¢ per gallon on the gasoline *sold* or stored, the tax 'to be used solely in the construction and maintenance of a highway system in the state.'" (Emphasis supplied.) (288 U. S. page 265, 77 L. Ed. page 737.)

We are under the impression that this Court confines its decision to the facts presented by the record in a case being reviewed by it, and we can find nothing from the report of the *N., C. & St. L.* case to indicate that the question of the taxability of local sales of gasoline in Tennessee was before this Court for consideration or decision.

The attorneys for appellants seek also to give the same construction to the holding of the statutory three judge court in *American Airways* v. *Wallace,* 57 F. (2d) 877, as they do to the holding of this Court in the *N., C. & St. L.* case, *supra* (Brief, page 47). The facts are very similar in the two cases, the principal difference being that in the *Airways* case, the complaining taxpayer was a carrier by plane rather than by rail, but secured and handled gasoline for its planes in the same manner in which the Railway

Company did. We think what we have stated above with reference to the *N., C. & St. L.* case also applies here. We quote the following significant language from the opinion in the *Airways* case:

> "Chapter 58, Pub. Acts of 1923, imposes a tax upon all persons, corporations, etc., engaged in and carrying on the business of 'selling' gasoline and distillate in the State. Chapter 67, Pub. Acts of 1925, amends Chapter 58, Pub. Acts of 1923, increases the tax and *enlarges the scope of the law* so as to include 'storers' and 'distributors' of gasoline. It provides that 'storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions' and that the tax shall accrue whether such withdrawal be for sale 'or other use.'" (Emphasis supplied.) (Page 878 of 57 F. (2).)

The phraseology of the 1927 Acts has been so closely followed in all the subsequently enacted Alabama gasoline tax statutes that the same interpretation must be given to all the acts, in so far as their provisions are relevant to this case. This was the view of the District Court as expressed in its opinion in this case.

> "There are several other Acts passed imposing additional taxes aggregating six cents per gallon, but they contain the same verbiage so the construction of one applies to all."

The 1932 Act added a tax on the business of refining, but that has no important bearing on the questions involved in this case, as all the gasoline in controversy was refined outside of Alabama. In the last 1935 Act, the privilege of "storing" *eo nomine* was added to the privileges previously taxed. However, the same privileges taxed in all the other acts adopted subsequent to 1923 are taxed in the 1935 Act in the same manner as they were taxed in the previous acts, which privileges are "selling, distributing or with-

drawing from storage." The word "storing" is added in the disjunctive and it appears to us that this strengthens our contention that there are now and have been since the 1927 Acts were adopted several privileges taxed in the alternative, but it is clearly the intent of the Acts that when the tax is paid for the exercise of one of the privileges named in the Acts, there is due no tax on account of the other privileges. For example, the tax with respect to the gasoline sold is measured exclusively by the quantity of gallons sold and no other privilege tax with respect to or measured by that gasoline is levied or imposed by the Acts.

(2) *Interpretation of the Gasoline Tax Statutes Based on the Language Therein Employed.*

None of the taxes now claimed by the State were levied by the 1923 Act which imposed a tax based only on sales. All of the statutes enacted subsequent to the 1923 Act purport to levy a tax on the same parties, namely, distributor, retail dealer or storer, except in the 1932 and subsequent acts the word "refiner" is added. The business of refining as such has never been taxed by the statutes. All the acts adopted since 1923 purport to tax in the alternative the following privileges: selling, distributing or withdrawing from storage, except that the last 1935 Act adds the term storage which it purports to tax in the alternative along with the other acts named.

For convenience, Section 2 of the first 1927 Act is set out and following it is Schedule 156.1 of the Revenue Act of 1935:

> "SECTION 2. Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the selling, distributing or withdrawing from storage for any use gasoline as herein defined in this State, provided however that this excise tax shall not be levied upon the sale of gas-

oline in interstate commerce, and provided further that where the excise tax of two cents per gallon upon the sale of such gasoline shall have been paid by a distributor or by a retail dealer or storer such payment shall be sufficient, the intention being that the tax shall not be paid but once" (R. 22).

"SCHEDULE 156.1. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline as herein defined, provided, however, that this excise tax shall not be levied on the sale of gasoline in interstate commerce, and provided further, that where the excise tax of six cents ($.06) per gallon upon the sale, distribution, storage or withdrawal from storage of such gasoline shall have been paid by a distributor, refiner, or by retail dealer or storer, such payment shall be sufficient, the intention being that the tax shall be paid but once" (R. 45).

To contend that the business of selling gasoline is not taxed is to do violence to the plain phraseology contained in each of the acts. The same is also true if it is contended that the business of distributing is not taxed.

The acts define the term "distributor" to include anyone who engages in selling gasoline in the State by wholesale domestic trade. Therefore, a party who is engaged in "distributing" is one who sells at wholesale to the domestic trade. A "retail dealer" is defined in all the acts as including persons defined in the acts as distributors who are also engaged in the selling of gasoline in the State in broken quantities.

If the Legislature did not intend to retain the tax on the business of selling originally incorporated in the 1923 Act, or if it did not intend to tax the business of distributing first named as a taxable occupation in the 1927 Acts, it is

difficult to understand why these taxable privileges are named in all the acts subsequent to 1923. If it had been the purpose to impose a tax based only on storage or withdrawals, the statutes could have been very materially shortened and simplified and all the gasoline used as a basis for the taxes now levied could have been used to measure a storage or withdrawal from storage tax. We respectfully submit that the Legislature intended to and did tax both the privilege of selling and the privilege of distributing.

The following provision appears in the 1927 and subsequent acts:

> "The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided that 'sellers' of gasoline and its substitute paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

This is the last provision in the acts relating to the imposition of the tax or specifying on what basis the tax should be computed and paid. It is a well recognized canon of statutory construction that if there is any ambiguity in the statutes, the last provisions appearing therein are presumed to reflect the controlling intent of the lawmaking body.

The above quoted provision plainly provides that "sellers" of gasoline may compute and pay the tax based on sales. Refiners, storers and distributors are required to compute and pay the tax on the basis of their withdrawals *or* distributions. A distributor, therefore, pays his tax

based on his distributions, which means the payment of the tax is based on the "selling of gasoline in this State by wholesale domestic trade." Counsel for appellants on page 60 of their brief try to draw a distinction between the use of the verb "may" in the latter part of the quoted sentence and the word "shall" in the previous part of the sentence. They say the word "may" is permissive and the word "shall" is imperative. (Appellants' brief, page 60). The word "may" is the expression last used in the sentence with reference to computation of the tax on sales and is controlling. Moreover, the word "shall" is used in the last part of the sentence with reference to refiners, storers and distributors and from this expression these persons are required to pay the tax on the basis of their withdrawals *or distributions.*

There is no conflict in the provisions of the quoted sentence. The first part of the sentence merely provides that the excise tax imposed by Schedule 156.1 shall apply to persons storing gasoline and distributing the same or allowing the same to be withdrawn from storage. The tax imposed by Schedule 156.1 is one tax of six cents per gallon either upon the "selling, distributing, storing or withdrawing from storage." A storage tax is not the only tax imposed by this schedule but taxes on the other named privileges are levied in the disjunctive. Of course, one of these taxes applies to persons storing gasoline just as other taxes apply to the business of selling or distributing. If Schedule 156.2 had provided that all persons storing gasoline and withdrawing same for any purpose were subject to the storage or withdrawal from storage tax levied in Schedule 156.1, there might be some basis for the argument of appellants, provided further that the last part of the sentence in Schedule 156.2, which allows sellers to compute and pay the tax based on their sales and distributors to

compute and pay the tax on the basis of their distributions had been omitted. However, it is respectfully submitted that the sentence contained in the statute is plain and affords no sound basis for the contention that it was the intent of the Legislature to require *sellers or distributors* to compute and pay the tax on gasoline sold or distributed by them upon the basis of the amount of gasoline stored or withdrawn from storage.

In the brief for appellants it is further stated that as all the gasoline which the Company sells in Alabama is brought from Port Arthur, Texas and stored in the State before any of it is sold or distributed, the Company is a storer within the definition of Section 1 of the Act, which provides that the term "storer" shall include any person who ships or causes to be shipped or receives gasoline in the State and stores the same in any manner and withdraws or uses the same for any purpose (Brief, pages 59 and 60). By the same token, the Texas Company is also a distributor as defined in the Act, as it sells at wholesale, and is also a retail dealer according to the statutory definition as it sells gasoline in broken lots. Schedule 156.2 of the last 1935 Act and the corresponding sections of the other acts plainly provide that refiners, storers and distributors shall compute and pay the tax on the basis of their withdrawals or distributions, which we interpret to mean that the distributors pay on the basis of their distributions. This schedule also very plainly specifies that sellers may pay the tax based on their sales.

The Texas Company occupies a dual status under the acts; as to the gasoline it brings into the State and stores and uses for its own requirements it is subject to the tax based on storage or withdrawals from storage; if it gives its gasoline away in the State, it is likewise subject to the same tax. However, as to the gasoline it sells or distrib-

utes, it pays a tax based only on the amount sold or the amount distributed.

It is further stated in appellants' brief that the tax is primarily one on storage, but when the gasoline in some manner has escaped that tax, the handling of such gasoline is subject to a tax measured by the quantity sold (appellants' brief, page 59). It is difficult for us to conceive that there could be a tax collected on account of sales of gasoline in Alabama which would not also be subject to a storage tax, for even if the gasoline was brought into the State by the seller in original containers a storage or a withdrawal from storage for use tax could be imposed and collected thereon, after the gasoline had come to rest, upon its withdrawal for use.

No provision of any of the statutes nor any decision or ruling is cited by appellants to sustain their novel interpretation of the states that it is only when the gasoline has in some manner escaped the storage tax that the handling of the gasoline is subject to a tax measured by the quantity sold. To say that the tax is successively laid on storage or withdrawals from storage and then on sales only where gasoline cannot be reached by the storage or withdrawal provisions is, we respectfully submit, placing an interpretation on the acts not warranted by any language therein contained.

The later provisions in all the acts show that they impose a tax based on sales as well as one on withdrawals and the sale is always the privilege first mentioned. For example, Schedule 156.14 of the last 1935 statute provides that if any person liable for the tax fails to make the prescribed monthly returns and pay the excise tax "on or before the 20th day of the month following the sale, distribution or withdrawal" the Commission shall make a return for the

delinquent taxpayer and assess the tax and penalties (R. 52).

The Texas Company with respect to the gasoline sold and delivered to the United States occupied either the status of a distributor or of a retail dealer, as all of such gasoline was either sold from the Mobile terminal in tank car lots or from bulk stations in barrels or other containers or from the service stations in retail quantities. Therefore, as to all this gasoline, if the Texas Company was legally subject to any tax at all, it was subject to the tax on selling or on distribution and the amount of such tax should be computed and measured by the amount so sold or distributed. And such a tax in respect of sales made to the United States would, we submit, clearly be controlled by the decision in the *Panhandle Oil* case (*Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 72 L. Ed. 857).

(3) *Administrative Interpretations of the Alabama Gasoline Tax Statutes.*

Soon after the decision by this Court in the *Panhandle* case, the Attorney General of Alabama rendered an opinion to the State Tax Commission, dated August 22, 1928, holding that as the 1927 statutes levied a tax on the sale of gasoline where there was a sale the tax imposed under these statutes could not be collected with respect to the gasoline sold to the United States (R. 54-58). We quote several excerpts from this opinion:

> "In reply will say that the reasons given in said opinion by the Supreme Court of the United States for the unconstitutionality of the Mississippi law, as applied to sales of gasoline to the United States by a distributor, apply with equal force to the statutes of the State of Alabama, whether the Act of 1923, or that of 1923, as amended Acts, 1927, page 326, et seq."

* * * * * * *

"The tax levied by the State of Alabama is 'an excise tax of two cents per gallon upon the selling, distributing or withdrawing from storage for any use.' The tax levied by the State of Mississippi is that 'any person engaged in the business of distributing gasoline or retail dealer in gasoline shall pay for the privilege of engaging in such business an excise tax of one cent per gallon upon the sale of gasoline.'

"It is quite evident, when the reasons given by the United States Supreme Court are considered, that such reasons are as applicable to the Alabama law as to the Mississippi law. When a sale is made by a distributor, retail dealer or storer of gasoline to the United States, whether Alabama or Mississippi no tax can be collected on such sale from either the seller or purchaser, and no tax can be exacted of the seller measured by the number of gallons of gasoline so sold.

"Mississippi taxes the business with a tax measured by the number of gallons sold, while Alabama taxes the sale of each gallon sold at two cents per gallon. Alabama also taxes the distributing or withdrawing from storage for any use. It *taxes but once, and where there is a sale, the tax is on the sale.* Where there is no sale, but a distribution or withdrawing from storage for some use, other than selling, there is a tax on such withdrawal or distribution. We are not here considering such withdrawals, but only sales to the United States." (Emphasis supplied.)

The foregoing opinion was followed by another opinion of the Attorney General of Alabama to the Attorney General of the United States, to the effect that refunds of taxes paid under the gasoline statutes could not be made, but that if refund was made the Legislature would have to make provision for it (R. 58).

On July 14, 1933, the Attorney General of Alabama, who was successor to the Attorney General who had rendered the opinions in 1928, rendered an opinion to the State Forester in reply to the latter's request as to whether

State and County taxes on gasoline, oil and grease apply to gasoline used in motor vehicles owned or leased by the Federal Government, advising that in his opinion the gasoline so purchased by the United States was not subject to the tax (R. 127).

The Alabama statutes were uniformly administered by the State Officials from August 22, 1928, to July 5, 1935, in line with the rulings of the Attorneys General. On the date last mentioned, the present Attorney General rendered an opinion that as the statutes levied a tax on storage measured by the gallons withdrawn from storage, the State could collect the tax with respect to the gasoline which had been sold to the United States (R. 59-69). The opinion of July 5, 1935 was the first official ruling changing the construction of the gasoline statutes which had been placed thereon by the previous Attorneys General from 1928 up until that date.

During this period the State Tax Commission by letters and circulars gave assurances to the Texas Company that there was no tax with respect to the gasoline sold by it to the United States. The last communication of this character was a letter from the Commission dated March 11, 1935 (R. 143). The other communications are set out in the record on pages 137 to 142. In one of the communications to the Texas Company, the State Tax Commission advised as follows:

> "In other words when the gasoline passes from you to a customer, the tax accrues, but it does not accrue when the gasoline only passes from one of your storage tanks to another and remains your property."

The Texas Company did not include in the price of the gasoline which it sold and delivered to the United States any of the taxes levied by the gasoline tax statutes (R. 96). The returns show that the taxpayer was treating this

gasoline as exempt from the State tax (R. 130-136), and the State Tax Commission with knowledge of this fact never from the date of the *Panhandle Oil* decision until June 17, 1935, made any claim or demand that there was any liability for taxes on account of these transactions (R. 122).

Forms were prepared by the State Tax Commission and were forwarded to the taxpayers with separate blanks for the monthly report of sales and of withdrawals from storage (R. 130-136). These forms provided for separate and distinct calculations of two classes of gasoline, dependent on whether it was sold within the State or withdrawn for use other than sale within the State. Certainly it cannot be contended that any of the gasoline which was included under the sales items was required to be also included under the items relating to withdrawals from storage. In the instructions appearing on the forms the State Tax Commission specifically required that sales and withdrawals must be entered separately, and they cannot be construed in any other manner than that they mean that all sales must be included under one item and that all withdrawals for use other than sale must be included under another item. One of the instructions appearing on the forms is as follows:

> "This return is required of all gasoline sold or withdrawn from storage in Alabama, except that it is not required from filling stations when such stations purchase gasoline from distributors in this State or from distributors outside the State when such distributors report and pay tax on sales in Alabama."

It is clearly apparent from this provision that the interpretation of the Commission was that the provisions of the acts imposing the tax based on sales not only applied to sales which the taxpayer made to its retail customers or other consumers, but also applied to sales which the

taxpayer made to retail service stations which in turn sold the gasoline at retail. The State Tax Commission from the date of the *Panhandle* decision, July 5, 1935, never computed the taxes payable by the dealers in gasoline in this State on any other basis than by computing the taxes with respect to the gasoline sold by the amount of such sales, and with respect to the gasoline withdrawn from storage for use other than sale by the amount so withdrawn from storage (R. 124).

Attorneys for appellants contend that the "liberality" of the State Tax Commission in so construing the gasoline tax statutes can avail the Texas Company nothing. We respectfully submit that it was not out of a sense of generosity that the Commission was so construing the statutes, but it was following the official rulings of the Attorney Generals of Alabama by which rulings it was bound.

It is, of course, well recognized that, while long continued administrative interpretations of an ambiguous statute by the officers charged with the enforcement thereof are not conclusive as to the meaning of the statute, such interpretations are nevertheless very persuasive in arriving at the legislative intent. This is especially true where the Legislature reenacts the same statutes or ones substantially identical with knowledge of the interpretations placed thereon by the officials. The statutes of 1931, 1932 and the first statute of 1935 were adopted in the light of the rulings of the Attorney General and of the system of administering the previously adopted statutes. We do not think the ruling of the Attorney General of July 5, 1935, could possibly have had anything to do with influencing the Legislature with respect to the General Revenue Bill approved by the Governor on July 10, 1935. [See affidavit of Howell Turner, Secretary of State, to the effect that the Revenue Bill of 1935 was introduced in the Legislature on May 3, 1935, and that Schedules 156.1 and 156.2, which

are the provisions here important, were not changed from the date of the original introduction of the measure until the act was finally passed on July 3, 1935, except the numbers assigned to these sections were changed (R. 105-107).]

This Court has many times laid down the controlling principles with respect to the weight to be given to administrative interpretations of statutes by the court in arriving at their proper construction. We quote from *Surgett* v. *Lapice*, 8 How. 48, 68, 12 L. Ed. 982, 991:

> "The foregoing construction being the one adopted by the departments of public lands soon after the Act of 1832 went into operation, we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice prescribed by the commission of the general land office, acting in accordance with the opinion of the Attorney General, and which had the sanction of the Secretary of the Treasury and of the President of the United States."

From *Union Insurance Company* v. *Hoge*, 21 How. 35, 16 L. Ed. 61, 68:

> "The practical construction of this Act of 1849 by the public officers of the State, including the Attorney General, who were required to supervise the preliminary steps made necessary to the organization of the Company, and to certify that it had conformed to the provisions of the Act, and the latter officers especially, that the charter was in accordance with it, is deserving of consideration. Under the construction thus given, numerous companies have been organized, with charters like the present, providing for cash premiums, or premium notes, at the election of the insured, and an extensive business of insurance carried on in New York and several of the sister States; and, although this practical construction cannot be admitted as controlling, it is not to be overlooked; and perhaps should be regarded as decisive in a case of doubt, or where the error is not plain."

And from *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. Ed. 363, 370:

> "The principle that the contemporaneous construction of a statute by the executive officers of the government whose duty it is to execute it is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly embedded in our jurisprudence that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect."

In *Dismuke* v. *United States*, decided February 3, 1936, Manuscript Advance Opinions L. Ed., Vol. 80—No. 8, page 375, 379, this Court stated:

> "This has been the administrative ruling since 1920, see Claim of George Taylor Larkin, recorded in 21 P. & R. D. 42. A construction of such long standing is not lightly to be overturned. • • • Later legislation providing for payment of annuities to employees of the United States must be taken to have been adopted in the light of it."

We also quote from the opinion in *Coombe* v. *United States*, 3 F. (2d) 714, 717:

> "• • • The rule that established administrative practice shall be given great weight in determining the meaning of doubtful statutes or regulations is a wise one, and founded on sound principle. The citizen has a right to rely on long-continued administrative practice and on official interpretations which have long determined the manner and method of executing ambiguous laws and regulations. To hold otherwise would leave the citizen at the mercy of new constructions, endangering his business after he had adjusted

himself in good faith to an administrative practice that he had every reason to regard as firmly established."

(4) *There Have Been no Interpretations by the Alabama Supreme Court of the Provisions of the Gasoline Tax Statutes Imposing a Privilege Tax on the Selling or Distribution of Gasoline.*

The only Alabama case cited for appellants as throwing any light on the interpretation by the Courts of Alabama of the gasoline statutes is *State* v. *City of Montgomery*, 228 Ala. 93, 151 So. 856. The attorneys for appellants say that the holding in this case sustains their contention that a storage tax is imposed by the statutes on the gasoline brought into the State and subsequently sold by those dealing in this commodity. We regard the case more as an authority to the contrary.

The State sued the City for gasoline excise taxes. The City filed Plea 3 as follows:

> "• • • defendant purchased the gasoline outside of Alabama, shipped it in tank cars directly into storage tanks of defendant, and that defendant withdrew it from time to time from such storage tanks for use and was used by it in its governmental or municipal purposes and for nothing else."

If the City was liable for the taxes at all, it was on account of gasoline which it had purchased outside the State, shipped in and stored for its own use. None of the gasoline was purchased for resale. All that the Supreme Court had to consider was the liability of the City for taxes on the gasoline handled in this manner. The case was very much of the same character as *N. C. & St. L.* v. *Wallace; Foster & Creighton Company* v. *Graham;* and *American Airways* v. *Wallace, supra,* and what we have stated hereinabove relative to those cases is largely applicable to this

case. The City had the additional defense that as municipalities were not named in the acts as parties subject to the tax, there was no indication of a legislative intent to impose the tax on municipal corporations. The Alabama Supreme Court upheld this contention, but that phase of the case has no material bearing here. The Court distinctly recognized that the 1927, 1931 and 1932 Acts imposed taxes on distributors and retail dealers as well as on storers. We quote some excerpts from the opinion as follows:

> "The act first mentioned, Gen. Acts 1923, p. 36, levies a 2-cent tax on every distributor and retail dealer in gasoline for every gallon sold in this state. It defines a 'distributor' as including any person who shall engage in the selling of gasoline by wholesale in domestic trade, and a 'retail dealer' as including any person who is a distributor who also engages in the sale of gasoline in broken quantities.
>
> "Its provisions therefore do not show that the city is liable for a tax there described.
>
> "The act next mentioned, Gen. Acts 1927, p. 326, amends the first so that the tax is *also* levied upon a storer of gasoline, *in addition* to a distributor and retail dealer, and defines a 'storer' as including any person who ships gasoline into this State in tank quantities and stores and withdraws the same for any purpose.
>
> "The Act of January 25, 1927 (Gen. Acts, 1927, p. 16), is essentially the same as the last above mentioned in levying the tax. Such is also the Act of July 27, 1931 (pages 859, 860), and of November 5, 1932, Ex. Sess. (page 314)." (Emphasis supplied.)
>
> • • • • • • •
>
> "The acts in question impose a tax upon a storer as well as a distributor or retail dealer."

The issue before the court for decision was stated by it in the following language:

"But the facts alleged in plea 3 to the common counts may be held to show that defendant is a storer of gasoline as thus defined, and as counsel seem so to treat it, we will likewise do so."

There was no sale of gasoline involved in the case and no intimation that as to gasoline sold the tax was measured by storage or by withdrawals from storage. Nor was there any mention in the opinion of the provisions appearing in all the statutes providing that where sales are made the tax can be computed on the amount thereof. We think the case holds or at least strongly implies that the Legislature in adopting the 1927 Acts intended to retain the provisions of the 1923 Act imposing taxes based on sales.

The majority of the three judge statutory District Court who sat upon this case below, consisting of two Alabama District Judges, did not construe the opinion in the *City of Montgomery* case as holding that a storage tax was imposed with respect to gasoline which was sold. We quote from the opinion of the District Court as follows:

"The Act manifestly contemplates that the retail dealers and distributors will be engaged in selling gasoline while the storer does not sell it but uses it himself in some way, so that he is taxed not on the sale but on the use of the gasoline he withdraws from storage. This tax must have been imposed to cover those who brought gasoline into the State in large quantities and stored and withdrew it as needed for use to save paying the tax.

"These people do not sell gasoline but use it in their own vehicles or engines.

"This is what the Alabama Supreme Court had before it in the case of *State* v. *City of Montgomery*, 228 Ala. 93, where it is said:

'a tax upon the separate acts of the owner in taking his property out of storage for his own use.'

" 'The acts in question impose a tax upon a storer as well as upon a distributor or dealer.'

"So a storer is one who stores for his own use and not for the purpose of sale, and the tax is levied only where he withdraws the gasoline for his own use" (R. 229, 230).

* * * * * * *

"The case of *State* v. *Montgomery ante; Nashville C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249; and *Edelman* v. *Boeing Air Transp.,* 228 U. S. 249, involved only the withdrawal for use and not sales to the Government, and what was said would be applicable only to that feature of the Act. No right is claimed in the instant suit as to gasoline used by complainant.

"It is urged that *State* v. *Montgomery* is a construction of the Act and is binding on this Court, but it did not involve the question here presented" (R. 232).

The Circuit Court of Appeals, Fifth Circuit, in *Pan American Petroleum Corporation* v. *State of Alabama,* 67 F. (2d) 590 (a case which the appellants assert supports their contention as to the construction of the statutes), did not cite *State* v. *City of Montgomery* as holding that the gasoline sold in Alabama is subject to a storage tax. The date of the first decision in the *City of Montgomery* case was June 15, 1933, and the date of the first decision in the *Pan American* case was November 15, 1933. Rehearings were denied in each case.

We respectfully submit that the Attorney General of Alabama and the State Tax Commission were rather late in coming to the conclusion that *State* v. *City of Montgomery* held that the tax levied by the gasoline statutes was on storage with respect to the gasoline sold. As stated above, this case was decided on June 15, 1933, and thereafter on July 14, 1933, the same attorneys who represented the State in that case rendered an opinion to the State Forester that

there was no tax on the gasoline which was sold to the United States (R. 127). Even though it is said for the attorneys that the final rehearing in this case was not passed upon until January 18, 1934, yet approximately a year and a half intervened between that date and the time the Texas Company was notified by telegram that the State was going back for five years (the statutory period of limitation) to collect taxes alleged to be delinquent. It was not stated in the telegram that the claim was on account of gasoline sold by the Company to the Government, but any uncertainty as to the nature of the claim was soon dissipated by the Attorney General's opinion of July 5, 1935.

Not only did the Attorney General fail to change or overrule for a period of eighteen months following the decision in *State* v. *City of Montgomery* the rulings of the previous Attorneys General, but the State Tax Commission during that time continued to give assurances to the Texas Company and the other gasoline dealers that there was no tax liability on account of the gasoline sold to the Government (R. 137-143), and continued to accept the monthly returns showing the taxpayers were not paying any tax on the gasoline so sold. It is, therefore, respectfully submitted that the State officials could not have been very strongly of the opinion, until comparatively recently, that the decision in the *City of Montgomery* case was an authority that the tax could be collected on the gasoline sold to the United States, as in no other way can the inaction and delay in making the claims which are set up by appellants in the case at bar be accounted for.

In *Pan American Petroleum Corporation* v. *State*, 67 F. (2d) 590, the court was called upon to decide whether gasoline delivered to post exchanges located on United States military reservations was taxable under the Alabama gasoline tax statutes. The defendant oil company made two defenses: (1) That as the transactions took place on the

reservations they were handled without the jurisdiction of Alabama; and (2) post exchanges are departments of the United States. The court decided against both of these contentions. According to the opinion, it was contended that the tax accrued under the State statutes "only upon the use within the State of gasoline." That is not what we are contending for in the case at bar, our construction of the acts being that as to gasoline sold the tax accrues at the time of sale and is measured thereby, which is in line with the opinion of the Alabama Attorney General of August 22, 1928 (R. 54), and in line with the interpretation given to the acts by the State Tax Commission for a period of many years (R. 124).

In the opinion in the *Pan American* case, Circuit Judge Bryan, writing for the court, stated that the tax accrues on the gasoline at the time it is withdrawn from storage. The opinion recognizes the principle laid down by this Court in the *Panhandle* case, but states that as post exchanges are voluntary, unincorporated associations in which the members share in the profits and losses, the exchanges are not departments or instrumentalities of the Government and not entitled to tax immunity.

We do not think that if the withdrawal from storage tax applies, it would apply only upon that gasoline *used* in the State. It could also apply to all the gasoline withdrawn whether for use in interstate commerce or for use in other States, except it could not apply as we view it to gasoline sold or withdrawn for sale to purchasers who are exempt from the tax. The statute expressly exempts gasoline shipped in interstate commerce, but, of course, if the statute had imposed purely a storage tax it could have been made to apply to all the gasoline which came to rest in this State, even though such gasoline was subsequently shipped to other States by the persons who originally brought the gasoline into the State.

We respectfully submit the following as to that part of the opinion in the *Pan American* case, which states that the tax is based on withdrawals from storage even when the gasoline is withdrawn for sale and is sold:

(1) This is a holding by an intermediate Federal court giving its interpretation of a State statute not previously construed by the courts of that State, and, therefore, this Court is free to place such interpretation upon the statute as it may conclude is proper, although, of course, giving due weight to the decision of the learned Court of Appeals;

(2) The Circuit Court of Appeals probably did not have the benefit of as many facts as appear in the record in this case showing the history of the opinions of the various Attorneys General of Alabama and the administrative construction placed on the acts for a long period of years by the officials charged with their enforcement. The case was tried on an agreed statement of facts and we assume that the record in the Circuit Court of Appeals upon which the case was submitted is available to this Honorable Court, as it denied a petition for certiorari in the case (291 U. S. 670, 78 L. Ed. 1060);

(3) For aught that appears, the contention we make in this case as to the proper interpretation of the statutes, and we make no claims to infallibility, was not raised in the Circuit Court of Appeals and, therefore, that Court possibly did not consider this manner of interpretation of the statutes. In any event, the *Pan American* case was decided in 1933 and if the State officials thought it afforded a way by which to tax the gasoline sold in Alabama to the Federal Government, they delayed for a considerable time in making claims to this effect. Much of what was said above with respect to what transpired after the decision in the *City of Montgomery* case, *supra*, applies here.

Ervin et al. v. *State of Alabama*, 80 F. (2d) 432, decided after the trial in the District Court of the case at bar, is cited in appellants' brief, page 45. In this case, the taxability of gasoline brought into the State by a common carrier for its own use was involved. None of the gasoline was sold in the State. District Judge Ervin, the same judge who wrote the opinion in the case at bar, held that all of this gasoline except a comparatively small amount was subject to tax. The opinion of the Court of Appeals prepared by Circuit Judge Hutcheson states that it does not appear on what ground the District Judge concluded that a small portion of the gallonage was not taxable. That part of the decree of the District Judge holding that the major part of the gasoline brought into the State and used by the railroad was subject to the tax was affirmed, and the Circuit Court of Appeals also held that all of the gasoline should have been held taxable and that the taxes accruing thereon were secured by a prior lien in favor of the State on the property of the railroad located in Alabama. No taxes with respect to the sale of gasoline were involved. The facts were very similar to those involved in *N. C. & St. L. R. Co.* v. *Wallace; Foster & Creighton Co.* v. *Graham;* and *American Airways* v. *Wallace, supra,* and there is nothing decided in the *Ervin* case as to the taxability of the gasoline there involved with which we take issue.

In view of the situation with respect to the decisions by the Alabama Courts and by the Circuit Court of Appeals, Fifth Circuit, it is respectfully submitted that this Court is free to decide in the light of the information before it the meaning of the statutes in so far as they apply to gasoline sold in Alabama to the Federal Government. It is very earnestly submitted that the facts shown by the record in this case amply support the conclusion that it was the intent of the Legislature in enacting the statutes to impose a tax measured by sales on the gasoline sold in the State.

(5) *As the Gasoline Statutes Tax Gasoline Sold in the State Measured by the Number of Gallons Sold, the Tax Cannot be Collected on the Gasoline Sold by the Texas Company to the United States, as This Would be a Tax on the United States Contrary to the Federal Constitution.*

If we are correct in our views as to the proper interpretation of the Alabama statutes, then it is respectfully submitted that the facts in this case cause it to fall squarely within the scope of the decision of this Court in *Panhandle Oil Company* v. *Mississippi, supra.* See also *Graysburg Oil Company* v. *State of Texas,* 278 U. S. 582, 73 L. Ed. 519, decided by this Court on January 21, 1929. Under these holdings, the State of Alabama cannot collect any tax based on sales by the Texas Company to the United States.

The *Panhandle* case has been many times cited by this Court and other courts since its decision in 1928 and the principles enunciated were applied in the same manner with respect to the right of the United States to collect an excise tax based on sales of motorcycles to a municipality where the article purchased by the municipality was to be used for governmental purposes. *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 75 L. Ed. 1277. It is interesting to note that Mr. Justice McReynolds, who dissented in the *Panhandle* case, concurred in the *Indian Motorcycle* case, and that Mr. Justice Holmes, who also dissented in the first case, acquiesced on the ground of *stare decisis* in the second case.

We, of course, recognize that the tax imposed by the Alabama statutes is an excise tax and is not a direct tax on the gasoline. The Alabama tax is the same kind of State tax considered in the *Panhandle* case. The Attorney General of Alabama so recognized it in his opinion of

August 22, 1928 (R. 54-58). We quote again from this opinion as follows:

> "In reply will say that the reasons given in said opinion by the Supreme Court of the United States for the unconstitutionality of the Mississippi law, as applied to sales of gasoline to the United States by a distributor, apply with equal force to the statutes of the State of Alabama, whether the Act of 1923, or that of 1923, as amended Acts, 1927, pages 326, et seq (R. 54).

* * * * * * *

> "It is quite evident, when the reasons given by the United States Supreme Court are considered, that such reasons are as applicable to the Alabama law as to the Mississippi law. When a sale is made by a distributor, retail dealer or storer of gasoline to the United States, whether Alabama or Mississippi no tax can be collected on such sale from either the seller or purchaser, and no tax can be exacted of the seller measured by the number of gallons of gasoline so sold" (R. 57).

It is respectfully submitted that as the tax levied by the Alabama statutes is one based and computed on sales, the tax is unconstitutional and void in so far as it applies to gasoline sold by the Texas Company to the United States in Alabama.

(6) *The Gasoline Delivered by the Independent Service Station Dealers Under Contracts Which the Texas Company had with the United States is not Subject to the Tax.*

The facts as to deliveries to the United States made through independent service stations under contracts which the Texas Company had with the United States are fully set out in the record, pages 118-120, and the type of

such contracts is also fully shown on pages 174-194 of the record.

The Texas Company entered into arrangements with the independent service station dealers handling its gasoline to the effect that if an agent or employee of the United States desired gasoline and could show it was for governmental purposes by producing a Federal exemption certificate, Form 44 (R. 129), or other credentials showing he was authorized to purchase gasoline for the Government, the dealer would let the Government agent or employee have his requirements, taking his receipt therefor, and would then turn in the credentials and receipt to the Texas Company who would at the end of the month bill the department of the United States for whose account the gasoline was purchased under contracts between the Texas Company and the United States and would at the same time enclose the receipts showing the name of the person receiving the gasoline and the amount thereof. The Texas Company has in its files tax exemption certificates, Form 44, which were taken by the independent dealers on each occasion when they delivered gasoline to the Federal agents or employees. After the bills from the Texas Company covering this gasoline were received by the United States, it would in due course pay the Texas Company for the gasoline so delivered. The title to the gasoline originally billed to the dealer passed to him but the Texas Company replaced all gasoline he had delivered to the Government without charge and the dealer was credited and paid an amount equivalent to what he would have made if he had sold the gasoline to third parties. The Texas Company in its monthly reports to the State Tax Commission included in the gasoline it showed as delivered and sold to the United States the quantity of gasoline handled through the independent stations. We think it proper to add that though the State officials prior to June 17, 1935, never made any

claim for taxes on the gasoline sold and delivered by the Texas Company from its own terminal, bulk stations, service stations or from its consigned stocks located in service stations owned by third parties, the officials did from time to time claim that the Company was liable for the taxes on the gasoline delivered in the manner above stated through the independent stations (R. 141-143).

It is evident that this arrangement between the Texas Company and its independent dealers was made so that the independent dealers could make deliveries to the Government under and on account of the contracts which the Texas Company had with the United States, and so that the Government could acquire its gasoline as needed under these contracts at the most accessible service station handling the Texas Company product. There was no procedure provided by the State whereby the United States or the independent dealer or the Texas Company could get any refund of taxes paid on gasoline sold to the Government. (See opinion of Alabama Attorney General to the United States Attorney General, dated November 22, 1928, R. 58, 59). See also letter from State Tax Commission to the Texas Company, dated January 8, 1935 (R. 142), which reads in part as follows:

> "Under the State law, there is no provision for refunds and we can only allow the exemption where the gas is bought from a taxpaying dealer."

If the tax is sustained as to transactions where the dealer does not import his requirements from another State and is held invalid where the dealer receives his stocks from other States and thereafter sells it through his own equipment, then it means that despite the fact that both kinds of dealers may sell the same commodity through the same type of equipment, which may or may not be as accessibly located in some instances as in others, never-

theless the United States must partonize one class of dealers but not the other in order to be immune from the tax on all of its gasoline purchases.

However, the facts in this case are much stronger than if an independent dealer was buying his gasoline within the State and thereafter selling same on his own account to the United States, as here the deliveries were made to the United States under contracts which the Company had with the United States specifying to which Federal departments deliveries would be made. The United States paid the Texas Company directly for the gasoline and all the deliveries were made pursuant to arrangements between the Company and independent dealers under which the independent dealers understood that the deliveries would be made for the Company. If the gasoline which the dealer delivered to the Government had been consigned to the dealer, there could be no possible question but that such gasoline would have occupied the same status as gasoline delivered through the equipment of the Company. Likewise if the Company had "ear-marked" certain gasoline which it delivered to the dealer as destined for delivery under the Government contracts there would seem to be no room for any question. Furthermore, we do not believe there could be any reasonable grounds for contending that gasoline so handled took a different tax status from the gasoline delivered to the United States from facilities owned and operated by the Texas Company.

We respectfully submit that the facts in *Indian Motocycle Company* v. *United States*, decided by the Court of Claims on February 4, 1935, 9 Fed. Supp. 608, cert. den. by this Court October 4, 1935, — U. S. —, Vol. 80, Advance Sheets, U. S. L. Ed. No. 1, page 11, 56 Sup. Ct. 116, presented a stronger case for the liability of a tax claimed by the United States on the transactions there involved than the facts set out in this record do with respect to liability for

the taxes here claimed by the State. The tax claimed by the Government from a manufacturer in the *Motorcycle* case was based on a Federal statute imposing excise taxes on the sale of motorcycles. Some of the motorcycles had been sold by a manufacturer to a dealer who in turn sold them to a municipality for governmental purposes. The facts were stipulated in the case and we quote one of the stipulations as follows:

> "In this type of transaction, delivery was always made by the manufacturer to the dealer or on dealer's order, and the dealer made payment to the manufacturer. The method pursued by the manufacturer in delivering, billing, and accounting in such cases was not different from its method in ordinary sales to dealers."

The Court of Claims in its opinion held that transactions of this character were not subject to the tax, the opinion reading in part as follows:

> "There is no substantial distinction between sales made by the plaintiff to a city on an order received from it, and sales made through the order of an independent dealer in the manner stated. The two transactions are the same in substance. The *direct tax burden on the city purchasing the vehicle is exactly the same in each case, it paying the entire tax.* The plaintiff in each case receives the same amount for the article sold, the profit to the independent dealer is the same, and the sales price to the municipality, including the tax, is precisely the same. The plaintiff on the receipt of an order for a vehicle, whether the order comes directly from the city or a local dealer, knows that it is being purchased by the city for use in the performance of essential governmental functions, and in each case makes special markings on the vehicle to indicate its use. In view of these facts, which have been stipulated by the parties and are not in dispute,

the sales in question fall within the decision of the court in *Indian Motorcycle Co.* v. *United States, supra,* and are exempt from the tax." (Emphasis supplied.)

Referring generally to this part of the discussion, we also call attention to *Norfolk National Bank* v. *Commissioner of Internal Revenue,* 66 F. (2d) 48, decided by the Circuit Court of Appeals, Fourth Circuit, on June 15, 1933.

The tax levied by the Alabama statutes is in its essence a tax on the consumer. The tax from the time it attaches is a concomitant of the gasoline and becomes indissolubly connected with it in the same form and to the same extent as imposed by the statutes. What possible difference can it make to the consumer whether the gasoline is sold once or twice in Alabama before it reaches him? The gasoline is only used as a measure of the tax one time and the tax burden to the consumer is the same regardless of the number of times it is sold in the State before it is purchased by him.

The statutes in a number of States allow refunds direct to the consumer where he uses gasoline for purposes other than motor fuel. The refund statutes in these States make no distinction as to whether the gasoline is sold one or more times before it reaches the consumer. (See Exhibit C to Appendix to this brief.)

(7) *An Excise Tax Measured by the Number of Gallons of Gasoline Withdrawn From Storage For Sale and Delivery to the United States is a Tax on the United States.*

Without waiving our insistence in the foregoing portion of this brief that the Alabama gasoline tax is based on sales where the gasoline is sold, we respectfully submit that a tax based on withdrawals of gasoline for sale or delivery to the United States is the same in substance and legal effect as a tax based on the sales of such commodity. There is no practical distinction between the two taxes, as the

amount of the tax is based on the same gasoline, is calculated on the same number of gallons, remitted by the same taxpayer and the tax burden inevitably falls on the purchaser in the same manner. The point for decision is not merely a question of by what nomenclature the tax is designated, but what its real operation and effect is. The character of a tax cannot be changed by merely changing its name.

It is contended by counsel for appellants that the tax which applies to the gasoline involved in this case is one upon the privilege of storing measured by the amount withdrawn from storage (appellants' brief, page 33). The tax never accrues until the gasoline is withdrawn from storage, and the tax is measured solely by the amount so withdrawn. The Attorney General of Alabama in his opinion of July 5, 1935, [illegible]e nature of the tax as interpreted by him in the following language:

> "* * * it is my opinion that the tax imposed by the several acts accrues upon and at the time of withdrawal from storage, and whether the withdrawal is actually made for wholesale or retail trade or for other use is immaterial."

In the opinion of the Alabama Supreme Court in *State* v. *City of Montgomery, supra,* the tax applying to the gasoline which is subject to the storage or withdrawal from storage tax is defined as follows:

> "The acts in question impose a tax upon a storer as well as a distributor or retail dealer. We think this is true though it is not due until it is withdrawn from storage, and is measured by the amount so withdrawn rather than the amount placed in storage. True, it may leak and waste out of storage, or explode, and thereby and to that extent no tax is payable; but the whole of the acts taken together show, we think, that

> the purpose is to impose the tax on the storage, though measured by the amount withdrawn, and then it becomes due to be paid."

In the agreed statement of facts, it is stated that it has been the uniform practice of the State Tax Commission to compute the tax on the gasoline either sold or withdrawn from storage as follows: As to the gasoline sold or intended for sale, no tax was computed or paid until the title thereto passed to the purchaser, and as to the gasoline withdrawn for use other than for sale, no tax was computed or paid until such gasoline was actually withdrawn for such other use (R. 124).

In the light of these interpretations, it is earnestly submitted that the tax is not one on *storage* but is one on the privilege of *withdrawing from storage for use*. The conclusion of the District Court as to this phase of the case is stated in its opinion as follows:

> "The Act and the practice of the state has been where gasoline was withdrawn from one place of storage and placed in another no tax was imposed, yet here was a withdrawal from storage, but the purpose was not to use it or sell it, so again it was the use for which the withdrawal was made that determined whether the tax was imposed.
>
> "Suppose a man builds a large tank and stores gasoline for others at a price, he never sells or uses it, they withdraw it and place it in their filling stations for sale. He is in the business of storing gasoline, but he would pay no tax.
>
> "Or, if one figured the price would go up and he bought and stored gasoline in large quantities during a period of more than a year, he would pay no tax for that year. So we see the tax is not levied on the storage but on the use for which it is withdrawn" (R. 230).

If there is no liability for the tax on gasoline which is originally stored but subsequently leaks and wastes out of

storage or explodes, how can the tax be said to be one on the privilege of storing? If gasoline is stored for one, five or ten years, there is no tax liability unless it is withdrawn from storage. If a person stores gasoline in the State for a long period of years and then sells it in place to another party the person originally storing never becomes liable for any tax though he has clearly exercised the privilege purportedly taxed. It seems to us an anomaly to say that a tax is based on the storage of gasoline where the amount of the tax is measured only by the quantity of gasoline withdrawn from storage for use and does not accrue until such withdrawal takes place.

This Court has many times said that in considering the nature of a tax it is not bound by the definition as found in the act and that where it is passing on the effect of an act under the Federal Constitution, it is not bound by the characterization of it by the State Court. We quote from the opinion prepared by Mr. Justice Roberts in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 79 L. Ed. 1054 as follows:

> "In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect. 'The substance and not the shadow determines the validity of the exercise of the power.' "

We also quote from the opinion prepared by Mr. Justice Holmes in *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346, 67 L. Ed. 297:

> "But this court, although bound by the construction that the Supreme Court may put upon the statute, is not bound by the characterization of it, so far as that characterization may bear upon the question of its constitutional effect."

The attorneys for appellants contend that the District Court erred in stating in its opinion that all of the acts

adopted during the period from 1927 through 1935 contained the same verbiage so that the construction of one of the acts applied to all of them (appellants' brief, pages 34 and 35). All of the acts adopted subsequent to the 1923 Act, except the act last adopted in 1935, imposed a tax of a designated amount per gallon "upon the selling, distributing or withdrawing from storage for any use gasoline" (R. 4, 22, 27, 32 and 38). The last 1935 Act imposed a tax of six cents per gallon upon "the selling, distributing, storing or withdrawing from storage in this State for any use gasoline." The attorneys for appellants contend that the gasoline sold by the Texas Company to the United States during the period the acts adopted prior to the last 1935 Act were in effect was subject to a storage tax under such prior acts. They assert that this construction is supported by the language of the Alabama Supreme Court in *State* v. *City of Montgomery, supra.* If a storage tax was levied by the acts in effect previous to the effective date of the last 1935 Act, how can the addition of the word "storing" in the act last mentioned change the character of this act from the acts previously in effect? This addition would merely be surplusage. In view of the affidavit of the Secretary of State (R. 105), it is submitted that there can be no basis for a finding that the Alabama Legislature in adopting the last 1935 Act was influenced by the Attorney General's opinion of July 5, 1935. There is no mention made in the dissenting opinion of Circuit Judge Hutcheson that there was any distinction between the last 1935 Act and the acts previously in effect.

We earnestly submit that if the acts adopted from the period from 1927 to the first half of 1935 did not impose a tax on storage but imposed a tax for the privilege of withdrawing from storage for use, then the last 1935 Act likewise does not impose a storage tax, for the reason that

this Act does not require any taxpayer to make a return or pay any tax on account of the gasoline stored by him. The taxpayers were required under the 1935 Act, as they were required under the previous acts, to make a report only of "all sales and withdrawals of gasoline made by them" during the next preceding calendar month. We quote Schedule 156.3 of the last 1935 Act:

> "On or before the twentieth day of each month after this Chapter shall have taken effect, every person upon whom this excise tax is levied, shall render to the State Tax Commission on forms prescribed by such Commission, a true and correct statement of *all sales and withdrawals of gasoline* made by him or them during the next preceding calendar month, and shall furnish the said Commission such other information as such Commission may demand and/or require, upon blanks to be formulated and furnished by said Commission, and at the time of making such monthly report shall pay to the State Tax Commission an amount of money equal to the excise tax herein levied." (Emphasis supplied.)

The taxpayers under the 1935 Act are not even required to keep a record of the gasoline stored by them. We quote Schedule 156.5 of this Act:

> "All distributors, refiners, storers or retail dealers shall keep, for not less than two years, within the State of Alabama at some certain place or office, such books, documents or other papers as will clearly show the *amount of sales, distributions or withdrawals of gasoline* made in this State covered by this Chapter." (Emphasis supplied.)

In Schedule 156.14 of the last 1935 Act, which relates to delinquencies in payment of the tax, no mention is made of failure to pay any tax on account of storage. We quote:

> "If any distributor, refiner, storer or retail dealer in gasoline covered by this Chapter shall fail to make the monthly returns prescribed herein and pay the ex-

cise tax hereby laid, on or before the 20th day of the month following sale, distribution or withdrawal, the State Tax Commission shall make return for such delinquent upon such information as it may reasonably obtain, assess the excise tax thereon, and add a penalty for failure to make such return and pay the tax herein levied of twenty-five per cent (25%) of the tax due, to the amount as assessed by the Commission."

If there is no provision made in a statute levying a tax or in any other statute specifying the time or manner in which the tax shall be paid, then there is no valid or enforceable tax. It is clear that there are no provisions in the last 1935 statute which could possibly indicate that a tax accrued on storage as such. Of course, if the tax accrues at the time of withdrawal from storage for use and is measured by the amount withdrawn, then the tax is in substance and legal effect a tax based on the withdrawal from storage for use and is not a tax for the privilege of storing.

For the sake of argument, let it be assumed that the statutes levy a tax based on the privilege of storage and that each of two persons store the same quantity of gasoline in the same kind of containers and under like conditions, one storing his own gasoline and the other storing in his own equipment for a consideration gasoline of third parties, and at the end of a year the party storing his own gasoline withdraws same for use and simultaneously the gasoline stored by the other party explodes and is destroyed. Each person has exercised the same privilege of storing under identical conditions, except one owns his own gasoline and the other stores gasoline, the title to which is in third parties. Would it not be violative of the equal protection or due process clauses of the Constitution to exact the storage tax from the person who withdrew his gasoline from storage for use and not exact the tax from the other? If the tax is for the withdrawal from storage for use, then it is obviously proper to

collect from the party withdrawing for use and not from the other, as the latter never exercised the privilege taxed. As we view it, this Court demonstrated in *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 65 L. Ed. 638, that a storage tax of the kind that attorneys for appellants contend is levied by the Alabama statutes could not be upheld. We quote from the opinion of Mr. Justice Brandeis:

> "The name by which the tax is described in the statute is, of course, immaterial. * * * Nor is the alleged business of merely owning and storing whisky in bond made taxable. So long as the whisky is stored in bond within the state, it is free of the tax. One may own and store the whisky for years in the hope of selling it at a profit, and yet be free from any obligation ever to pay this tax, if, before its removal from bond within the state, the whisky is sold to another, or if, while so owned, it is destroyed or forfeited to the government."

The distinction between a storage tax and a tax such as the tax levied by the Alabama statutes, which the attorneys for appellants contend is a storage tax, is well stated by the Supreme Court of Florida in *Sheip* v. *Amos*, 100 Fla. 863, 130 So. 699. We quote from the opinion as follows:

> "The essential difference between the Kentucky tax and the tax now under consideration is that the present act of storing the commodity, which is a species of 'use', and not its future withdrawal, which is merely a change in the form of possession not amounting to a taxable 'use', is made the criterion of our tax.
>
> * * * * * * *
>
> "Primarily, liability for the tax arises by reason of the present act of storage, a species of use. Liability for the tax is not dependent upon the future and uncertain act of withdrawal, a mere change in the form of possession, as in the *Kentucky Distilleries* Case,

supra, nor is it a tax upon consumption, although it is applicable only to the storage of gasoline 'to be used and consumed' in this State."

In *Gregg Dyeing Company* v. *Query,* 286 U. S. 472, 76 L. Ed. 1232, this Court considered a tax enacted by the State of South Carolina, which was a valid tax for the privilege of storing gasoline in that State. The tax there attached to gasoline brought from another state after it had been kept in storage for a period of twenty-four hours or more following its loss of interstate character as a shipment in interstate commerce. The tax only applied to gasoline intended to be stored or used for consumption in the State. While all of the sections of the act are not set out in the opinion, we assume all of this gasoline was required to be reported and the tax paid thereon by the 20th of the next succeeding month after its arrival in the State. (Such a provision as to reporting a payment of the tax appears in Section 2512 of the Civil Code of South Carolina of 1932). There can be no doubt but that this statute imposed a valid tax based on the privilege of storing and unlike the Alabama acts the time of the accrual of the tax is clearly fixed and the measure of the tax clearly determined by the quantity of gasoline stored.

It is, therefore, respectfully submitted that the District Court properly concluded that all the statutes enacted subsequent to 1927 were the same kind as those enacted in 1927 and that all should be treated in the same manner.

(8) *An Excise Tax Measured by the Number of Gallons Withdrawn From Storage for Sale and Delivery to the United States Imposes a Tax Burden on the United States in the Same Manner as Does an Excise Tax Measured by the Amount Sold.*

Due to the volatile and inflammable qualities of gasoline, it is required to be stored in closed metal containers. In

the agreed statement of facts, it is stipulated that when gasoline of the seller is stored in tanks or containers in Alabama, before it can be delivered into storage tanks or containers or in the fuel tanks of the vehicles of the purchasers, it is first necessary to withdraw such gasoline from storage from the tanks or containers of the seller (R. 125). Of course, the seller could bring the gasoline into the State in metal barrels or drums and then sell and deliver the article to the purchasers in the original containers, but the seller is taking such gasoline from his warehouses or storage depots located in the State for delivery to the purchasers would still be withdrawing the gasoline from storage. See *Ervin* v. *State of Alabama, supra.*

The gasoline could be delivered to the Government in interstate commerce, it taking title before or at the time the gasoline reaches its destination, and the gasoline could then be stored by the United States in its own tanks or containers. This procedure was suggested by appellants in the answer that they filed in the District Court (R. 87). Again the gasoline after its storage by the seller in Alabama could be sold to the Government in place and the Government could then withdraw it from storage. Of course, if the Government receives its gasoline in interstate commerce, such gasoline would clearly be exempt from tax and when the Government withdrew such gasoline for its own purposes, it would not have to pay any tax, as it would be the only one liable for the reporting and payment of the tax. Under the interpretation of the attorneys for appellants, however, if the gasoline is sold to the Government in place in the tanks or containers of the seller, the seller would still be liable for a tax on account thereof but for the holding in the *Panhandle* case, as the attorneys contend the purpose of the tax on gasoline for the privilege of selling only applies when the gasoline has in some manner escaped the storage tax (R. 59).

We readily admit that the United States could set up its own storage tanks into which its gasoline could be shipped in interstate commerce and from such storage tanks deliver the gasoline direct to its agents or employees needing same to carry on the Government's business and it could in addition also buy or build and own and operate its own tanks and pumps in the cities, villages, hamlets and other points in the State from which small deliveries could be made into the vehicles of its agents and employees as needed by them in the carrying on of their duties in the various parts of the State. Such a system of handling gasoline in the State would clearly exempt the Government from the burden of the tax on the gasoline used by it in Alabama and the equipment and other property owned and used by the Government would be exempt from *ad valorem* and other forms of State taxation. But would not the Government in this situation be availing itself more of the facilities and protection furnished by the State without paying any tax therefor than it would if it bought its requirements from dealers who paid all *ad valorem*, license, and other taxes levied by the State and the various subdivisions thereof, except the gallonage taxes on the gasoline sold to the United States?

This Court has not yet laid down the doctrine that the United States by using the machinery or facilities of the State is subject to a tax on account thereof. See *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 67 L. Ed. 703, where this Court in a unanimous opinion prepared by Mr. Justice Holmes held that the State of Alabama could not collect a privilege tax for recording mortgages owned by a Federal Land Bank, even though the facilities for the recording of the mortgages were furnished by the State. Of course, the functions carried on by the United States in a state in most

instances inure to the benefit of the citizens of the state or to the citizens there located, as well as to the citizens in other states, and this applies to the functions carried on by the United States in each state. The citizens of a state are as much citizens of the United States and they contribute in the form of taxation and otherwise to the carrying on of both governments. It therefore follows that when a state foregoes taxing the Federal Government on account of the operations carried on therein, whether by reason of constitutional prohibition or otherwise, the citizens of the state who contribute to the cost of the Federal Government as well as to the operation of their state government, are not caused to suffer loss.

If a tax based on the number of gallons sold to the United States is a tax on the United States, a tax based on withdrawals from storage for sale to the United States is likewise a burden on the United States. The act of withdrawing gasoline from storage for sale is a necessary ingredient in the consummation of the sale where the delivery of the gasoline is from the containers of the seller into the containers of the buyer. To tax an essential element of a transaction is to tax the whole transaction. In the opinion in the *Panhandle* case prepared by Mr. Justice Butler, it is stated:

> "To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale."

We respectfully submit that the above sentence could be paraphrased as follows and the conclusion would be equally true:

> "To use the number of gallons withdrawn from storage for sale to the United States as a measure of the privilege tax is in substance and legal effect to tax the sale."

It is now well recognized both in the courts and by the legislatures in many states that excise taxes levied by the states on the selling, distributing, withdrawing from storage, storing or use of gasoline measured by the quantity of gallons so employed, are taxes the burden of which is borne by the consumer. They are of such character that they are directly passed on where the commodity is sold. There are many taxes included in the price at which an article is sold that are not capable of exact separation or identification and the extent to which these taxes are reflected in the cost to the purchaser cannot be tangibly pointed out or allocated with even approximate exactitude or certainty. However, the gallonage taxes of the kind considered here are definitely identified and the seller in fixing the price of the gasoline separately adds them and passes them on to the purchaser in exactly the same form in which they are imposed.

In *Jefferson County* v. *Hard*, 227 Ala. 201, 149 So. 81, decided in 1933, the Alabama Supreme Court stated for the purpose of the decision that the gasoline statutes then in effect in Alabama were taxes passed on and borne by the consumer. We quote from the opinion as follows:

> "We note the following averment in the petition for mandamus: 'Petitioner avers that the gasoline purchasers in Jefferson County have paid into said fund for gasoline purchased by them in Jefferson County an amount greatly in excess of the amount which Jefferson County receives under the disbursement of said funds.'
>
> "Taking this as true on demurrer, and assuming that the taxes, wherever paid, are passed on to the consumer, and should be treated as paid where the consumer buys the gas, we observe that one of the bases on which excise taxes on motor fuels are levied for highway purposes is the benefit derived by the purchaser from good roads constructed and maintained by the tax he pays.

"Now this beneficial use has no relation to county boundaries. Purchasers of gas in one county may use it on the roads in many counties, or even beyond state lines; neither are the purchasers, the taxpayers, under above averment, confined to the citizens of the county where purchased."

In *Gregg Dyeing Company* v. *Query, supra,* this Court considered a contention by the taxpayer that as it had to pay an excise tax of six cents per gallon based on the storage of all gasoline brought into the State of South Carolina and used by it, and as no tax was levied for a like privilege on parties buying their requirements within the State, the complaining taxpayer was unconstitutionally discriminated against. In the opinion prepared by Mr. Chief Justice Hughes, it is pointed out that the party purchasing the gasoline in the State had paid precisely the same amount of tax on its gasoline because the seller of the gasoline in the State had to pay a tax of six cents per gallon for the privilege of selling same, which tax the purchaser paid when he bought from the seller. We quote from the opinion as follows:

"Reading together the statutes with respect to gasoline taxes, the state court took the view that as to the gasoline tax with respect to sales within the State, the burden actually rests upon the consumer, although not placed upon the consumer directly. No reason is found to challenge this view. *Texas Co.* v. *Brown* (258 U. S. 479, 66 L. Ed. 727, 42 S. Ct. 375) *supra; Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 222, 72 L. Ed. 857, 858, 56 A. L. R. 583, 48 S. Ct. 451; *Indian Motorcycle Co.* v. *United States,* 283 U. S. 578, 579, 75 L. Ed. 1282, 1283, 51 S. Ct. 601. So far as dealers in gasoline within the State are concerned, there appears to be no ground for appellants' claim of discrimination. The point with respect to appellants is that they are not dealers but users, consumers of gasoline in their business. They are required to pay the

tax with respect to the gasoline they keep for such use and consumption within the State. As to such gasoline, they pay precisely the same amount per gallon as other consumers within the State are in effect required to pay through the tax on the dealers from whom such consumers buy."

The opinion in this case was unanimous. We respectfully submit that this Court would most probably have reached the same conclusion if the tax the State distributors had to pay on the gasoline handled by them was a tax for the privilege of storing instead of a tax for the privilege of selling.

In *Monamotor Oil Company* v. *Johnson*, 292 U. S. 85, 78 L. Ed. 1141, this Court considered a statute of the State of Iowa which levied a tax of two cents per gallon, later raised to three cents, on all motor vehicle fuel "used or otherwise disposed of in this State for any purpose whatsoever." In the opinion prepared by Mr. Justice Roberts, attention was called to the fact that the distributor liable for the reporting of the gasoline and payment of the tax was required by statute to pass it on to the consumers. It was further stated that the consumers or purchasers were allowed a refund on all gasoline used by them for purposes other than the propulsion of motor vehicles. This Court considered the tax as purely one on the consumer. We quote excerpts from the opinion as follows:

"The distributor who reports the gasoline and pays the tax is required to pass the burden on to the consumer, who is advised that in addition to the price of the gasoline he is paying a license fee to the State. To prevent evasion the distributor must pay and pass on the tax on all gasoline imported or distributed, irrespective of its ultimate use; but as some purchasers employ the gasoline for a purpose other than the propulsion of a motor vehicle, and as the burden of the tax has been passed on to them as well as those who de-

sire a motor fuel, provision is made for a refund to the former."

"The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors from users of motor vehicle fuel, and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; the user does. It cannot therefore be said that any tax is laid upon the appellant in case of another class of taxpayers."

The fact that the Iowa statute expressly required the distributor to pass on the tax to the consumer no more in our opinion effectively proves that the tax is on the consumer than where such a requirement is not incorporated in mandatory form in statutes levying taxes of this kind. The price at which distributors or others may sell their gasoline is not subject to regulation by the State (*Williams* v. *Standard Oil Company*, 278 U. S. 235, 73 L. Ed. 287), although we suppose if they sold it at all in States which had statutes like the Iowa statute, they would have to sell it at a price at least equivalent to the State tax. However, when a seller of gasoline sells his product at a net loss to him, how can it be said that he is absorbing the State tax or a portion thereof any more than it can be said that he is taking the loss with respect to some elements exclusive of taxes which enter into the cost? The only practical effect we can conceive of a statute containing provisions like those in the Iowa one, to the effect that the tax must be passed on to the consumer, is that it is a legislative recognition that taxes of this character should be borne directly by the consumer.

The legislatures in a number of States allow the consumers of gasoline refunds of gasoline excise taxes levied by them where the gasoline is not to be used in the propulsion of motor vehicles, notwithstanding the statutes levying

the tax require distributors to collect, report and pay the tax in the first instance. For example, in the State of Oregon, dealers are required to render a statement monthly of all motor fuel used, sold or distributed by them (Oregon Laws 1933, ch. 428, Sec. 5). Where the gasoline is used by purchasers other than as motor fuel on the highways of the State, the purchasers thereof are allowed direct refunds of the tax. We quote:

> "Any person, firm or corporation who shall buy and use any motor vehicle fuel as defined in this Act for the purpose of operating or propelling stationary gas engines, tractors, motor boats, or who shall purchase or use any of such fuel for cleaning or dyeing or other commercial use of the same, except in motor vehicles operated or licensed to be operated upon any of the public highways of the State of Oregon, or who shall purchase and export the same for use outside this state, and who shall have paid any tax on motor vehicle fuel levied or directed to be paid, as provided by this Act, either directly by the collection of such tax by the vendor from such consumer, or indirectly by adding the amount of such tax to the price of such fuel and paid by such consumer, shall be reimbursed and repaid the amount of said tax paid by him," etc. (Oregon Laws 1935, ch. 403.)

In 1935, the State of Delaware levied a tax of four cents per gallon on motor fuels sold and delivered or used in the State. One of the paragraphs in the preamble to the act reads as follows:

> "Whereas, it is found that the practicable effect of the levying of a tax on motor fuels sold by the distributors is that the tax is in fact collected from the consumer, by being added to the price of such fuel, and the burden of the tax paid by the distributor is passed on to and paid and borne by such ultimate consumer, and accordingly, that the consumer who uses such mo-

tor fuel in motor vehicles and for the operation thereof is in practical effect paying a license fee and tax upon the motor vehicle itself;'' (Senate Bill 122, Approved April 18, 1935.)

Paragraph (b) of Section 16 of the act makes provision for refund of any tax paid on gasoline not used in motor vehicles. Paragraph (e) of Section 6 of the Act, as do the acts in many other States, expressly exempts motor fuel used by the United States or any of its agencies.

A brief statement of the substance of the laws in the other States levying gasoline taxes of the same general character as those involved in the present suit are set out in Exhibit C of the Appendix to this brief. Only those features of the laws which we think might be informative or helpful in considering the issues involved in this case are mentioned.

The affidavit of F. L. Tosch, Chief Accountant for the Texas Company at its district office in Atlanta, Georgia, states that the average profit his company made on the gasoline sold and delivered in Alabama to the United States was less than one cent per gallon. It is further stated if the Texas Company has to pay the State excise tax with respect to the gasoline withdrawn from storage for sale and delivery to the United States, it will in the future add to the price at which it sells or attempts to sell such gasoline the amount of the excise taxes in effect at the time such sales or attempts to sell are made (R. 97). See also affidavits of representatives of other oil companies which state the method employed by such companies with respect to the gasoline sold in Alabama by these companies to the United States (R. 98-105).

The contract dated June 21, 1934, covering deliveries from the Mobile terminal of the Texas Company to the War Department at Fort McClellan during the period from July 1, 1934, to September 30, 1934, specified a price of

$.07718 per gallon (R. 149). The price under the contract providing for shipments from the Mobile terminal to the War Department, Fort McClellan and Maxwell Field and to the Tennessee Valley Authority, Wilson Dam, during the last three months of 1935 specified a price of around $.09 per gallon where the gasoline was delivered FOB destination and a price of $.07 per gallon for deliveries FOB Mobile (R. 214). At price levels like these which necessarily include the cost of refining and shipment from Port Arthur, Texas, handling charges and many other items such as *ad valorem* taxes on its property, equipment, etc., it is not reasonable to suppose the Texas Company could or would absorb an additional tax of six cents per gallon.

Where deliveries are made by the Texas Company from bulk stations or service stations, the prices charged the United States are higher (R. 167-194), on account of the additional handling charges and other services involved in making the deliveries at points other than at the terminal.

It can scarcely be assumed that the United States expects or desires that parties selling to it gasoline shall do so at a loss by absorbing taxes of this nature. We respectfully submit that it can be reasonably concluded from the facts in this record that if the tax attaches to the gasoline sold to the Government, the price to the Government will be increased accordingly. In this connection we quote from the opinion in the *Panhandle* case as follows:

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons."

Conceding that one of the taxes levied under the Alabama statutes might be classified as a valid one on storage, and we make this concession without desiring to waive anything we have hereinabove contended to the effect that there is not such a tax levied, the tax burden would fall in the same manner on the Government as where the gasoline is measured by the amount sold. As we understand the decisions of this Court, any tax which directly and immediately falls on the Government is forbidden unless the Government waives its immunity. It matters not under what guise an excise tax is levied nominally on a party transacting business with the Government, if one of the necessary operations to carry on or conclude the transaction is taxed in such manner as that the tax will be passed on in the same form and extent to the Government, then it is a tax on the Government. In considering the nature of the privileges taxed under the Alabama statutes, the comprehensive plan or purpose in enacting the statutes must be considered. It is without question under the holding in the *Panhandle* case that the tax levied on selling gasoline is a direct tax on the purchaser. The other privileges purported to be taxed are levied under the same comprehensive scheme and a like interpretation should be placed on them. The whole machinery as to the levy, computation and collection of the tax is all pursuant to one common end. All of the taxes levied by the statutes are designed to fall immediately and in the same form on the purchasers or ultimate consumers of the gasoline.

It is very significant, we think, that although all or practically all of the states have in effect taxes on those dealing in gasoline measured by the amount sold, distributed, stored, withdrawn from storage or used, there have not been cases, which have come to our knowledge, prior to the one at bar since the decision in the *Panhandle* case,

in which claim was made by a state that if it could not levy taxes for the privilege of selling gasoline to the Government measured by the amount thereof, such gasoline could be made to bear a tax under the guise of denominating it a tax on storage or withdrawal from storage. The State of Tennessee under its statutes, which attorneys for appellants contend are so similar to the ones in effect in Alabama, has never, according to our information, contended that gasoline sold in that State to the United States could be used as a measure of any tax imposed by its laws. While the universal recognition by the states that their statutes imposing taxes of the same general character as those imposed by the Alabama statutes do not levy a tax on the gasoline which is sold to the United States does not prove that such a tax cannot be collected, it does strongly indicate, we respectfully submit, the construction of such statutes by the other states.

It does not seem to us to be in accord with established legal principles that when statutes have been administered in one manner for a long period of time, and in the light of these interpretations the Legislature reenacts the same statutes from time to time, that then the State can successfully maintain that the effect of the statutes has been entirely misconceived and that the statutes mean something entirely different. We are reminded by the contention of the appellants in this case of what this Court said in the recent case of *Lee* v. *Bickell,* 292 U. S. 415, 78 L. Ed. 1337, with reference to the contentions of some of the officials of the State of Florida. We quote from the opinion prepared by Mr. Justice Cardozo:

> "Finally in Florida itself, the very statute now in controversy was ruled by the appellant's predecessor in the office of Comptroller to be inapplicable to these transactions or to others not to be distinguished. Counsel for the appellees, uncertain as to his clients'

duty, put the case to the Comptroller, and received a favorable ruling. For nearly two years the statute was so administered till the present appellant, reaching out, it seems, for new sources of public revenue, found or thought he had found the evidence of an intention to tax a copy made in Florida of a memorandum in New York.

* * * * * * *

"The directive force of all these signposts of intention is little less than irresistible when the series is viewed together. The meaning ascribed to the statute by the judges of the court below gives it coherence and simplicity. The meaning read into it by the Comptroller splits it into jarring fragments, one a plan for the taxation of the operative documents, all executed in one place, and the other a plan for the taxation of casual reports and copies, executed in another. These plans, to be sure, might be held to coexist if the purpose to combine them were unmistakably disclosed, yet disclosure short of that would be too weak to make the combination plausible. The Florida decisions tell us that doubts, if nicely balanced, will be resolved in favor of the taxpayer."

As we interpret the decisions of this Court, the controlling features in determining whether an excise tax nominally imposed on those who do business with the United States is not whether a tax is laid on a sale or measured by it, but whether the tax directly falls on the United States no matter under what guise or form the tax may be levied.

Western Union Telegraph Co. v. *State of Texas,* 105 U. S. 460, 26 L. Ed. 1067;

Williams v. *Talladega,* 226 U. S. 404, 57 L. Ed. 275.

Attorneys for appellants cite *Edelman* v. *Boeing Air Transport,* 289 U. S. 249, 77 L. Ed. 1155, and *N. C. & St.*

L. R. Co. v. *Wallace, supra,* in support of their contentions. These cases involved taxes on gasoline to be used in interstate commerce operations. The controlling principles as to when a tax is a burden on interstate commerce are different from those applying to the immunity of the United States from taxation. We quote from the opinion prepared by Mr. Justice Holmes in *Johnson* v. *Maryland,* 254 U. S. 51, 65 L. Ed. 126:

> "The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer (for the cases in this field). They deal with the conduct of private persons in matters in which the states as well as the general government have an interest, and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch* v. *Maryland,* 4 Wheat. 316, 4 L. Ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today. *Farmers & M. Sav. Bank* v. *Minnesota,* 232 U. S. 516, 525, 526, 58 L. Ed. 706, 711, 34 Sup. Ct. Rep. 354."

The recognition of the distinction is further stated in the opinion of Mr. Justice Holmes in *Gillespie* v. *Oklahoma,* 257 U. S. 501, 66 L. Ed. 338, as follows:

> "The criterion of interference by the states with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the states are to exist and make laws. *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628, 41 L.

Ed. 833, 17 Sup. Ct. Rep. 418; *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616, 47 L. Ed. 328, 332, 23 Sup. Ct. Rep. 206. The rule as to instrumentalities of the United States, on the other hand, is absolute in form and at least stricter in substance. *Williams* v. *Talladega*, 226 U. S. 404, 416, 417, 419, 57 L. Ed. 275, 280, 281, 33 Sup. Ct. Rep. 116; *Johnson* v. *Maryland*, 254 U. S. 51, 55."

This distinction was again pointed out in the opinion written by Mr. Justice McReynolds in *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136, 72 L. Ed. 202.

The immunity of the United States from state taxation is absolute except where waived by it.

Clallam County v. *United States*, 263 U. S. 341, 68 L. Ed. 328.

(9) *The State is Not Now in Position to Claim that the Texas Company is Liable for Taxes on the Gasoline Which Was Sold and Delivered By It to the United States During the Past Five Years.*

It is uncontroverted that the Texas Company did not include the State taxes with respect to the gasoline it sold to the Government since the middle of 1928. The record shows the Company was solicitous to comply with the laws of Alabama relative to this gasoline: It in good faith followed the rulings of the Attorneys General of Alabama and the interpretation of the statutes as it from time to time was advised by the State Tax Commission in response to its inquiries (R. 137-144). The only point of difference between the Company and the State Tax Commission was as to the gasoline delivered to the United States through the independent service stations. We do not contend that the Company is in the same position with respect to the gasoline delivered pursuant to commitments entered into

subsequent to July 5, 1935, the date of the last opinion of the Attorney General, in so far as the doctrine of estoppel applies. The official opinions of the Attorneys General of Alabama protect the tax officials of that State when the latter follow such rulings. (Exhibit D of the Appendix of this brief.) The taxpayer should be equally protected where he places the same reliance on the rulings that the State officials are entitled to place thereon.

The State should be required to follow just as strictly the rule of good faith and fair dealings in its relation with the people subject to its laws as the State requires such persons to follow in their transactions with it. It is difficult to conceive of a stronger case for the application of this principle than is shown by the facts appearing in the record in this case. We quote from the opinion of District Judge Gresham in *Indiana* v. *Milk,* 11 F. 389, 397, as follows:

> "Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel. *Com.* v. *Andre,* 3 Pick. 224; *Com.* v. *Pejepscut Proprietors,* 10 Mass. 155; *People* v. *Soc. for Prop. of Gosp.,* 2 Paine, 545; *State* v. *Bailey,* 19 Ind. 452; *People* v. *Maynard,* 15 Mich. 463; *Cahn* v. *Barnes,* 5 Fed. Rep. 326."

See also:

Walker v. *U. S.,* 139 Fed. 409 (affirmed C. C. A., 5th, 148 Fed. 1092 Mem.);

Curen v. *New York,* 79 N. Y. 511 (reversing 7 Daly, 544);

Philadelphia v. *Anderson,* 142 Pa. 357, 21 Atl. 976, 12 L. R. A. 751;

United States v. *Stinson,* 125 Fed. 907, affd. 49 L. Ed. 724;

United States v. *Willamette,* 54 Fed. 807, 811.

Conclusion.

The issues involved in this case are important to the United States, the State of Alabama, the Texas Company and to the persons and other companies selling gasoline to the United States. If the State can collect taxes with respect to the gasoline sold to the United States, so can certain of its counties now levying taxes of from one to three cents per gallon and so can its municipalities now levying taxes of from one to two cents per gallon (R. 97). The lubricating oils and greases sold to the Government will likewise bear a tax imposed under a State statute very similar in form to the gasoline statutes (R. 145). If gasoline sold in Alabama to the United States is taxable, so will the gasoline sold in other states be taxable, either under the statutes presently in effect or susceptible to easy amendment.

Where the line of governmental immunity is drawn in this case, it will apply alike to the United States and to the States. *Indian Motocycle Company* v. *United States, supra.* If the State can levy a gallonage tax with respect to the gasoline sold to the United States, the United States can also levy a tax with respect to the gasoline purchased by the states. Assuming the levy of the United States will be smaller than the State levy, as it now is, when state, county and city consumption of gasoline is totaled, it will probably largely exceed the amount bought in the State by the United States. Looking at the question from an economic and not strictly legal point of view, if the United States and the state governments each levy taxes with respect to the gasoline sold to the other, is it not, we respectfully inquire, insofar as taxes of this nature are concerned, merely a matter of swapping dollars?

It is readily apparent that the Texas Company will not benefit by any "windfall" regardless of the outcome of this case. If compelled to pay the taxes, interest and penalties on account of the past transactions, this will be an actual out-of-pocket loss, as the Company did not include the taxes in fixing the price of the gasoline sold to the United States.

It is respectfully submitted that the decree of the District Court was correct and should be affirmed by this Honorable Court.

Respectfully submitted,

JOHN S. COLEMAN,

Attorney for the Texas Company, Appellee;

BRADLEY, BALDWIN, ALL & WHITE,

A. J. BOWRON, JR.,

Of Counsel.

EXHIBIT A.

Copy.

AN ACT

Imposing an Excise Tax on Persons, Corporations, Co-Partnerships, Companies, Agencies or Associations Engaged in the Business of Selling or Distributing Gasoline or Other Liquid Motor Fuels in This State—providing for the Collection and Payment of Such Tax and the Distribution of the Funds Derived Therefrom and Fixing the Penalties for the Violation of any of the Provisions of This Act.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA, That:

SECTION 1. As used in this Act the term "gasoline" shall include gasoline, naptha and other liquid motor fuels commonly used in internal combustion engines, provided that nothing contained in this Act shall apply to those products commercially known as "kerosene oil", "distillates," "gas oil," "fuel oil" or "crude oil". The word "person" means and includes every person, corporation, co-partnership, company, agency or association. The term "distributor" shall include any person who shall engage in the selling of gasoline as herein defined in this State by wholesale in domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The term "retail dealer" shall include any person herein defined as "distributor" who is also engaged in the sale of gasoline as herein defined, at any place in this State, in broken quantities.

SECTION 2. Every "distributor" and "retail dealer" in gasoline shall pay an excise tax of two cents (2¢) per gallon upon the sale of gasoline in this State, provided that in no event shall any gasoline sold in interstate commerce be taxed, and provided further the excise tax of two cents (2¢) per gallon upon the sale of gasoline shall be paid only once.

SECTION 3. On or before the 20th day of each month after this Act shall take effect, every distributor of gasoline and every retail dealer of gasoline shall render to the State Tax Commission on forms prescribed by said Commission a true and correct statement of all gasoline sold by such distributor or retail dealer during the next preceding month liable for the payment of the excise tax herein prescribed, and shall furnish to said Commission such additional information as said Commission may require on blanks to be furnished by said Commission, and at the time of making such report shall pay to the State Tax Commission an amount of money equal to the excise tax herein laid. The statement herein required to be made by the distributor or retail dealer shall be sworn to before some officer authorized to administer oaths and the making of any false or fraudulent statement shall constitute perjury, upon the conviction of which the person so convicted shall be punished as provided by law for the crime of perjury.

SECTION 4. All distributors and retail dealers shall keep in Alabama at some certain place or office such books, documents or papers as will show clearly the amount of sales of gasoline made in this State covered by this Act.

SECTION 5. Within thirty days after the passage of this Act every distributor and retail dealer engaged in the sale of gasoline shall make a report on blanks furnished by the State Tax Commission to the State Tax Commission showing the place and post office address at which he is engaged in the business of distributor or retail dealer of gasoline, which information shall be entered by the State Tax Commission on a book kept for that purpose. After this Act becomes effective, no person shall engage in selling as a distributor or retail dealer any gasoline covered by the provisions of this Act in this State until he shall have made such report to the State Tax Commission.

SECTION 6. If any distributor or retail dealer in gasoline in this State covered by the provisions of this Act shall fail to make any report to the State Tax Commission as required herein, he shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not

less than Fifty Dollars ($50.00) nor more than Two Hundred Dollars ($200.00) for each offense.

SECTION 7. It shall be the duty of the State Tax Commission to enforce the provisions of this Act and the said Commission shall have the right itself or by any of its members or agents to examine the books of every such distributor or retail dealer of gasoline covered by this Act.

SECTION 8. The proceeds of the excise tax prescribed in this Act shall be divided between the State and the several Counties thereof as follows: one-half of such proceeds shall be paid into the State Treasury to the credit of the general fund to be used for general State purposes; the other half shall be divided and distributed equally among the sixty-seven Counties of the State. The one-half of such proceeds due the several Counties when collected by the State Tax Commission shall be paid to the State Treasurer, and the State Tax Commission shall also at the same time certify to the State Auditor the amount which is due to each County. The State Auditor shall at the end of each month after the said funds are so certified to him draw his warrant upon the State Treasurer payable to the County Treasurer or the County Depositary of each of the several Counties for the several amounts so due each county; and each of the County Treasurers or County Depositaries of the several Counties so receiving such warrants shall place such warrants or the proceeds thereof to the credit of the road and bridge fund of the particular county. And such fund so placed to the credit of the road and bridge fund in each County shall be used for the construction and maintenance of the public highways and bridges in such Counties and for no other purpose.

SECTION 9. The acceptance of any amount paid for the excise tax provided for in this Act shall not preclude the collection of the amount actually due. However, the amount actually paid shall constitute a credit against the amount actually due.

SECTION 10. The forms of all statements and reports required herein shall be prescribed and furnished by the

State Tax Commission. All costs of the enforcement of this Act shall be paid out of the State's share of the funds derived from the excise tax herein prescribed, upon the warrant of the State Auditor drawn upon the voucher of the Chairman of the State Tax Commission and approved by the Governor.

SECTION 11. If any distributor or retail dealer of gasoline covered by this Act fail to make the prescribed monthly return, the State Tax Commission shall make a return for such delinquent upon such information as may be reasonably obtained, assess the tax thereon, and add a penalty of 25% of the tax to the amount as assessed. The State Tax Commission shall as soon as practicable and before the thirtieth day of each month certify to the State Treasurer the names of all persons liable to pay the tax herein provided, together with the post office address and the amount of the tax and if any such taxes shall not have been paid, the Chairman of the State Tax Commission shall issue executions for the collection of such taxes directed to any Sheriff of the State, who shall proceed to collect the same in the manner now prescribed by law for the collection of delinquent taxes by County Tax Collectors and make return of such executions to the State Tax Commission. The taxes and all penalties herein provided for shall be held as a debt payable to the State by the person against whom the same shall be charged, and all such taxes, penalties and assessments shall be a lien upon all property in this State of the party charged therewith.

SECTION 12. Any distributor or retail dealer who shall violate any of the provisions of this Act may be restrained by proper proceedings instituted in the name of the State of Alabama by the Attorney General or any Circuit Solicitor from either distributing or selling gasoline, the sale of which is taxable in this State, until such person shall have complied with the provisions of this Act.

SECTION 13. All other State excise and inspection taxes on the sale of gasoline imposed before the passage of this Act shall be and the same are hereby repealed, and all State

laws and parts of laws in conflict with the provisions of this Act are hereby repealed.

SECTION 14. Should any Section or any part of this Act be declared unconstitutional it shall not invalidate the remainder thereof.

SECTION 15. This Act shall take effect on the first day of the month next succeeding its passage.

Approved Feb. 10, 1923.

EXHIBIT B.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE MIDDLE DISTRICT OF ALABAMA.

At Law.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, *a Corporation,*

v.

HENRY S. LONG, *as Chairman of the State Tax Commission of Alabama, and Individually,* JOHN P. KOHN, *as Associate Member of the State Tax Commission of Alabama, and Individually,* W. W. RAMSEY, *as Associate Member of the State Tax Commission of Alabama, and Individually, and* JOHN BRANDON, *as State Treasurer of Alabama, and Individually.*

Come the defendants, Henry S. Long, John P. Kohn, W. W. Ramsey and John Brandon as individuals, and, appearing specially for the sole purpose of objecting to the jurisdiction of the Court to hear and determine the above captioned cause, they separately and severally suggest the lack of jurisdiction of this Honorable Court to hear and determine the same, and they plead to the jurisdiction of

this Honorable Court, as aforesaid, and as grounds therefor, they assign the following:

1. That this suit is in fact and in truth a suit against the State of Alabama, albeit these defendants in their respective individual capacities are the nominal parties defendant thereto.

That the defendants, as individuals, have no personal or private interest in the subject of said suit; that under the provisions of Section 379 of the Alabama Revenue Act of 1935, if and when suit is brought against officers "for the recovery of the amount of the tax paid which it is claimed is excessive or invalid, and a court of competent jurisdiction determines what amount of such tax so paid is excessive or invalid, said court shall order the same repaid by the State of Alabama, or its agencies". So that, in this suit, although these defendants, as individuals, are made parties defendant, the real party in interest is the State of Alabama.

That the said suit is instituted under the purported authority of Section 379 of the Alabama Revenue Act of 1935, and defendants aver that said Section 379, and the statutory proceedings to which it refers, purported to give the consent of the State to be sued only in its own courts. That the immunity of the State of Alabama from being impleaded in a court of the United States, accorded to it by the Eleventh Amendment to the Constitution of the United States has not been waived by the enactment of the said statute, or by the enactment of any statute by the Legislature of Alabama.

Wherefore, defendants aver that this Honorable Court has no jurisdiction to hear and determine said cause.

2. That this suit is in fact and in truth a suit against the State of Alabama, albeit these defendants in their respective individual capacities are the nominal parties defendant thereto.

That the defendants, as individuals, have no personal or private interest in the subject of said suit; that under the provisions of Section 379 of the Alabama Revenue Act of 1935, if and when suit is brought against officers "for the

recovery of the amount of the tax paid, which it is claimed is excessive or invalid, and a court of competent jurisdiction determines what amount of such tax so paid is excessive or invalid, said court shall order the same repaid by the State of Alabama, or its agencies". So that, in this suit, although these defendants, as individuals, are made parties defendant, the real party in interest is the State of Alabama.

That the State of Alabama is immune from being impleaded in a court of the United States, under the provisions of the Eleventh Amendment to the Constitution of the United States. That no effective waiver of such immunity has been made or done by the State of Alabama.

Wherefore, the defendants aver that this Honorable Court has no jurisdiction to hear and determine the said cause.

EXHIBIT C.

Arizona.

Laws First Special Session 1931-32, Chap. 16, as amended by Session Laws 1933, Chap. 27.

TAX: A "license" tax is imposed upon every distributor as defined in the act, of five cents "for each gallon of motor vehicle fuel possessed, refined, manufactured, produced, blended or compounded in this State * * * or imported." (Sec. 1673.)

EXEMPTIONS: Motor vehicle fuel "in interstate or foreign commerce * * * or motor vehicle fuel sold to the United States or any department thereof" is specifically exempted from the payment of the "license taxes" levied by the act. (Sec. 1677a.)

REFUNDS: Any consumer or other person buying motor fuel within the State and using same for purposes other than propelling motor vehicles upon the highways of the State may file a claim for refund equivalent to the amount

of the tax levied upon the number of gallons purchased, at any time within six months from the date of purchase. Persons filing a claim for such refunds must prove the purchase within the State of the number of gallons upon which refund is claimed. It is provided that original invoices of sale shall constitute prima facie proof of claim. (Secs. 1677 b-c.)

Arkansas

Act 65, Acts 1929, as amended by Act 63, Acts 1931, as amended by Acts 5 and 11, Acts 1934, as amended by Acts 147 and 190, Acts 1935.

PURPOSE: It is the expressed purpose of this act to provide for the collection "at the source within this State of a tax on the sale or use of motor vehicle fuel * * * double taxation is not intended." The tax levied is to be collected from the manufacturer or wholesaler. It is stated that the further purpose of the act is "to provide for the repayment to the consumer of all tax on motor vehicle fuel not used in propelling motor vehicles on the public highways and roads" of Arkansas. (Secs. 37, 39, 49.)

TAX: The act provides for the levying of "a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel * * * sold or used in this State." (Sec. 23c.) The tax is payable monthly and is deemed to accrue when the manufacturer delivers the motor vehicle fuel to a carrier for transportation to a jobber, wholesaler, consumer or other person, or upon the delivery of motor vehicle fuel to a wholesaler receiving it before any tax has been paid upon same. (Sec. 40.)

EXEMPTION: Motor vehicles belonging to the United States are not required to pay any motor vehicle fuel tax and "where motor vehicle fuel upon which the tax has been paid is sold to any agent or employee of the United States Government for use in a motor vehicle belonging to the United States Government * * * the wholesaler or dealer may not charge the consumer with the amount of the tax but may claim the refund of same" as otherwise prescribed. (Sec. 35.)

2211

California.

Stats. 1923, p. 571 as amended by Stats. 1925, p. 659; Stats. 1927, p. 1308; Stats. 1929, pp. 112, 1551; Stats. 1931, pp. 105, 1652, 2001, 2288; Stats. 1933, pp. 1249, 1631; Stats. 1935, Chap. 558, 500, 607, 624.

TAX: The act imposes a "license tax" of three cents per gallon on gasoline "distributed." (Gasoline sold, donated, consigned for sale, stolen, bartered or used, is said to be distributed.) (Secs. 3, 7.)

EXEMPTION: Motor vehicle fuel "sold to the Government of the United States or any department thereof" is exempt from the tax and if the tax has been directly or indirectly paid, a refund may be claimed as provided for under refunds. (Sec. 10.)

REFUND: Any consumer or other person buying or using motor vehicle fuel for purposes other than propelling motor vehicles upon the public highway and "who shall have paid any license tax for any such motor vehicle fuel hereby required to be paid either directly, or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such license tax to the price of such fuel" shall be entitled to a refund. (Sec. 11.)

Colorado.

Session Laws 1933, Chap. 140, as amended by House Bill 288 of Thirtieth General Assembly, approved April 10, 1935.

TAX: A tax of four cents per gallon is imposed on the sale or use, measured by the total amount of motor fuel received by each distributor. (Sec. 2.)

EXEMPTION: Sales to the United States or any of its agencies specifically exempted. (Sec. 2.)

REFUNDS: Any consumer using motor fuel for purposes other than propelling motor vehicles upon State highways is entitled to a refund. Provisions substantially similar to California act. (Sec. 3.)

Delaware.

Session Laws 1935, p. 295.

TAX: A tax of four cents per gallon is imposed on gasoline "sold and delivered or used." (Sec. 6.)

EXEMPTION: Allowed to the United States and its governmental agencies. (Sec. 6e.)

REFUND: The tax is collected from wholesalers and distributors and a refund is provided for those using motor fuel for purposes other than propelling vehicles upon the State highways. (Sec. 16.)

District of Columbia.

Public No. 104—Sixty-Eighth Congress (H. R. 655).

TAX: A tax of two cents per gallon is imposed upon all motor vehicle fuels "sold or otherwise disposed of by an importer (as defined) or used by him in a motor vehicle." (Sec. 1.)

REFUNDS: Any person purchasing or using motor vehicle fuels for purposes other than propelling vehicles upon the public highways of the District of Columbia may apply for a refund. (Sec. 10.)

Florida.

Acts 1929, Chap. 13756 and Acts 1931, Chap. 15659, and House Bill 427, approved May 28, 1935.

TAX: A tax of seven cents per gallon is imposed upon the sale of motor vehicle fuel. (Sec. 1.) A complementary statute imposes a like tax of seven cents per gallon upon the storage of gasoline for use or consumption after the same shall have been stored within the State for a period of 24 hours. (Sec. 1.)

There are no specific provisions covering exemptions or refunds.

Georgia.

Laws 1927, Act 378 as amended by Laws 1929, Act 284.

TAX: Distributors must pay "an occupation tax of six cents per gallon" on motor fuels sold or used within the State. (Distributors are defined as including those who import motor vehicle fuels to the State for use, and keep same in storage for a period of 24 hours.) (Secs. 2, 1.)

No specific provisions covering exemptions or refunds.

Idaho.

Laws 1933, Chap. 46.

TAX: A tax of five cents per gallon is imposed upon motor fuels "sold, distributed and/or used." This tax is collected from motor fuel dealers and retailers. (Sec. 10.)

REFUND: The act contains provisions substantially similar to the California act, permitting refunds to consumers using motor fuel for purposes other than propelling motor vehicles over or on State highways. (Sec. 18.)

Illinois.

Senate Bill No. 85, approved March 25, 1929, with amendments effective January 1, 1934.

TAX: It is provided that every "distributor (as defined) * * * shall collect from the purchaser at the time of * * * sale three cents per gallon on all motor fuel sold * * * and shall also pay * * * three cents per gallon on all motor fuel used by him." (Sec. 6.)

EXEMPTION: Allowed as required by "the Constitution and statutes of the United States." (Sec. 6.)

REFUND: In the section imposing the tax, it is provided that "in each subsequent sale of motor fuel on which the three cents per gallon has been collected as herein provided, the amount so collected shall be added to the selling price, so that said amount is paid ultimately by the user of said

motor fuel." (Sec. 6.) However, "any person" who uses motor vehicle fuel for purposes other than operating a motor vehicle upon the public highways may claim a refund. (Sec. 13.)

Indiana.

Act No. 256, House, approved March 8, 1933, as amended by Act No. 91, H. approved March 5, 1935, and Act No. 54 H. approved March 11, 1935.

TAX: A tax of four cents per gallon is imposed upon selling, distributing or using motor vehicle fuel upon the public highways.

REFUND: Allowed to anyone on motor vehicle fuel used for purposes other than propulsion of motor vehicles upon State highways. (Sec. 1.)

Iowa.

"Iowa motor vehicle fuel tax laws"—enacted by Forty-Fifth Assembly, Extra Session 1934.

TAX: A "license fee of three cents per gallon * * * is imposed on the sale or use of all motor vehicle fuel sold or used." (Sec. 3.)

EXEMPTION: Allowed to the United States of America or any of its instrumentalities or agencies (Sec. 3.)

REFUND: Provision for passing on the tax to the consumer and allowing refunds to those using motor vehicle fuel for purposes other than the propulsion of motor vehicles on state highways, is similar to provisions of Illinois act. (Secs. 4, 29.)

Kansas.

1935, Chap. 311.

TAX: The act imposes a tax of three cents per gallon upon the "use, sale or delivery of all motor vehicle fuels used, sold or delivered." (Sec. 8.)

EXEMPTION: Allowed to the United States and its agencies (Sec. 8.)

REFUNDS: This act with respect to the features under consideration contains refund provisions substantially similar to the Illinois act. (Secs. 9, 10, 17, 18.)

Kentucky.

"Gasoline and fuel tax law", Acts General Assembly, 1932 Session (K. S. 4224B-1-11).

TAX: The act imposes a tax of five cents per gallon on all gasoline sold "at wholesale" (as defined). (Sec. 1.)

There are no provisions relative to exemptions or refunds.

Louisiana.

Act No. 6, Special Session 1928, as amended by Act No. 8, 1930, as amended by Act No. 16, 1932, as amended by Act No. 34, 1934; Act. No. 1, Extra Session, 1930.

TAX: A tax of four cents per gallon is imposed upon all gasoline or motor fuel "sold, used or consumed in the State of Louisiana." (Sec. 1.)

EXEMPTION: Allowed to "the Unted States Government or any agency or department thereof." (Sec. 14.)

Maine.

Sec. 80, Chap. 12 R. S. 1930, as amended by Chap. 190 P. L. 1931, and Chap. 283 P. L. Special Session 1932.

This act with respect to the features under consideration is substantially similar to the Colorado act, supra, with the exception that those persons using motor fuel for purposes other than the propulsion of motor vehicles over state highways may claim a refund to the extent of only three-fourths of the tax levied by the act. (Secs. 80, 83, 84, 89.)

Maryland.

Annotated Code Md., Art. 56.

This act imposes a tax of four cents per gallon upon motor fuel and with respect to the features under consideration, is substantially similar to the California and Colorado acts. (See Secs. 211, 212, 219, 219a.)

Massachusetts.

Acts 1932, Chap. 248; Acts 1935, Chap. 336.

TAX: An excise tax of three cents per gallon is imposed upon each gallon of motor vehicle fuel sold. (*Sale* is defined as including use.)

REFUND: A refund provision substantially similar to that contained in the Illinois act is provided. (Secs. 7, 9.)

Michigan.

Acts 1927, Act No. 150 as amended by Acts 1931, Act No. 160, and Acts 1935, No. 166.

PURPOSE: "It is the intent of this act to impose a tax upon the owners and drivers of motor vehicles * * * for the privilege" of driving upon the public roads. (Sec. 2.)

TAX: The tax imposed by this act and the exemption and refund provisions are substantially similar to the California act, *supra.*

Minnesota.

Laws 1925, Chap. 297 as amended by Laws 1927, Chap. 434; laws 1933, Chap. 417.

TAX; The act imposes "an excise tax of three cents per gallon on all gasoline used * * * in propelling motor vehicles" over the public higways. (Sec. 2720-71.)

The exemption and refund provisions of this act are substantially similar to those of the California act, *supra.*

Mississippi.

Art. 2, Chap. 116, Code of 1930, as amended by Chap. 21, extraordinary session of 1931, as amended by Chap. 93, H. B. 688, Laws 1932.

TAX: It is provided that all distributors or wholesale dealers of gasoline shall pay for the privilege of engaging in such business an excise tax of six cents per gallon on gasoline sold, used, or stored and/or distributed. (Sec. 4789.)

EXEMPTION: Allowed to the United States and its instrumentalities. (Sec. 4790.)

REFUND: It is provided that all gasoline imported will be deemed to have been brought into the state for use in propelling motor vehicles over state roads, and the tax is payable monthly upon such gasoline as shall have been brought into the state. However, anyone using gasoline for purposes other than the propulsion of motor vehicles over state roads may claim a refund. (Sec. 4785; Sec. 23 of H. B. 688, 1932.)

Missouri.

Laws 1925, p. 255.

TAX: An "excise tax" of two cents per gallon is imposed upon the sale or use of motor vehicle fuels within the state. (Secs. 7794, 7814.)

The collection of the tax and the refund provisions are substantially similar to those of the Mississippi act, *supra.*

Montana.

Acts of Montana, as re-enacted in referendum measure 1935, effective by proclamation of governor, May 19, 1931, as amended by Chap. 170, Laws 1933, and Chap. 116, Session Laws 1935.

TAX: A license tax upon distributors and dealers in gasoline, amounting to five cents on every gallon sold or distributed is imposed by this act. (Secs. 2382, 2383.)

REFUND: A refund provision substantially similar to that of the California act, *supra,* is provided.

Nebraska.

Laws 1933, p. 433; Laws 1935, Senate File 363.

TAX: The act imposes "an excise tax of four cents per gallon upon the use of all motor vehicle fuel within the state."

REFUND: It is provided that the dealer shall not only be entitled to deduct the customary percentage to cover shrinkage, but shall also be permitted to retain 1% of the tax collected as a "commission." Provisions are made for the refund of tax to the United States Government or its agencies and, in the event of loss to dealers.

Nevada.

Laws 1935, Chap. 74.

TAX: The tax imposes "an excise tax of four cents per gallon on all motor vehicle fuel * * * sold, distributed or used," but the dealer may deduct 2% thereof to cover costs of collection and losses occasioned by evaporation, spillage or other valid causes. (Sec. 2.)

EXEMPTION: Gasoline sold to the United States is exempt from tax and the seller may apply for a refund. (Sec. 5.)

REFUND: Any person "who shall buy and use any such fuel for purposes other than in or for the propulsion of motor vehicles and who shall have paid any tax on such fuel * * * either directly by the collection of such tax by the vendor from such consumer or indirectly by the adding of such tax to the price of such fuel, shall be reimbursed and repaid" the amount so paid by him or it. (Sec. 5.)

New Hampshire.

Public Laws 1931, Chap. 104.

TAX: The act provides that distributors shall pay a "road toll" of four cents per gallon upon gasoline distributed,

"the same being collected by the distributor from the dealer and by the dealer from the consumer." (Sec. 4.)

The act with respect to the features under consideration is substantially similar to the California act, *supra*, except that no express exemption to the United States is provided.

New Jersey.

Laws 1935, Chap. 319.

This act with respect to the features under consideration is substantially similar to the Nevada act.

New Mexico.

Laws 1933, Chap. 176; Laws 1934, Chap. 25; Laws 1935, Chap. 146.

This act is substantially similar to the Colorado act, *supra*, except that separate acts provide for a refund to every person using gasoline for purposes other than the operation of a motor vehicle upon the public highways of the state. (Laws 1931, Chap. 31; Laws 1933, Chap. 162; Laws 1935, Chap. 101.)

New York.

T. L. Sec. 283—284a-b.

With respect to the features under consideration, this act is substantially similar to the Colorado act, *supra*.

North Carolina.

P. L. 1931, Chap. 145, Sec. 24 as amended by P. L. 1931, H. B. 1242; P. L. 1933, Chaps. 137 and 211.

This act, with respect to the features under consideration, is substantially similar to the Nevada act, *supra*.

North Dakota.

"Motor vehicle fuel tax law" effective July 1, 1935; Acts 1935.

With respect to the features under consideration, this act is substantially similar to the Nevada act, *supra*, though no express exemption to the United States is provided.

Ohio.

General Code, Secs. 5526-41-12 as amended by H. B. 341, 1935.

With respect to the features under consideration, this act is substantially similar to the Nevada act, *supra*.

Oklahoma.

Oklahoma Stats. 1931, Secs. 12527-12579 as amended by Act approved April 5, 1933.

TAX: This act imposes an "excise tax of four cents per gallon upon the sale of each and every gallon of gasoline sold or stored and distributed, or withdrawn from storage within this state for sale or other use." (Sec. 12527 as amended.)

EXEMPTIONS: An exemption is allowed for all gasoline or motor fuel used for agricultural purposes. There is no express exemption to the United States. (Sec. 12576.)

REFUNDS: The act provides that any person who "purchases motor fuel within this state, on which, by reason of his non-liability for the excise tax a refund may be due", shall obtain such refund by filing claim therefor within the month next succeeding its use. (Sec. 12577.) It is further provided that a refund may be obtained when a distributor or retailer sells motor fuel to a purchaser under circumstances which preclude the collection of the excise tax levied by the state "because of any provision of the Constitution of the United States or any law thereof enacted pursuant to the Constitution." (Sec. 12575.)

Oregon.

1933 Acts. Chap. 428 as amended by Acts 1935, Chap. 403; act is substantially similar to the Nevada act with respect to the features herein considered.

Pennsylvania.

Laws General Assembly 1931, Act 105 as amended by Laws 1935, Act 181.

TAX: A state tax of three cents per gallon is imposed on all liquid fuels "used or sold and delivered by distributors within this commonwealth excepting liquid fuels delivered to the United States Government on presentation of a duly authorized United States Government exemption certificate or other evidence satisfactory to the department" and such liquid fuels used or sold and delivered as are not within the taxing power of the commonwealth under the commerce clause of the Federal Constitution. (Sec. 4.)

REFUNDS: It is provided that refunds may be made to distributors or retailers selling tax exempt fuel to the United States upon which the tax has been paid. (Sec. 17.)

Rhode Island.

Laws 1925, Chap. 679 as amended by Laws 1927, Chap. 1033, and Laws 1929, Chap. 1405 and Laws 1930, Chap. 1564.

This act with respect to the features considered, is substantially similar to the Nevada act.

South Carolina.

Civil Code of South Carolina, 1932, Title 25, Chap. 107, Art. 3, Secs. 2505-2520 and 2528, as amended by Laws 1932, Act. 804.

TAX: A privilege tax of six cents per gallon is imposed upon every person (as defined) engaging in "the business of selling, consigning, using, shipping or distributing for the purpose of sale" any gasoline within the state. (Sec. 2505.) A complementary tax is imposed on every person (as defined) importing gasoline into the state for use after such gasoline shall have been stored within the state for a period of 24 hours. (Sec. 2512.)

EXEMPTION: Allowed on gasoline sold to the United States. (Sec. 2528.)

South Dakota.

"South Dakota motor fuel tax law," approved August 8, 1933.

The tax imposed by this act is substantially similar to that imposed by the Nevada act, with respect to the features under consideration, except that no express exemption is granted to the United States.

Tennessee.

Code Tennessee, 1932, as amended by Acts 1933, Chap. 130.

TAX: The statute imposes a privilege tax upon distributors and dealers (as defined) of six cents per gallon for each gallon of distillate "refined, manufactured, produced or compounded by such (distributor or dealer) and sold, stored or distributed by him in this state or shipped, transported or imported by such (distributor or dealer) into and distributed, stored or sold by him within this state during such year." (Secs. 1127-28.)

EXEMPTIONS: It is expressly provided that motor fuel "not previously the subject of an original sale in this state, stored in this state for export to points outside the state, shall not be included in the measure of the tax liability of any distributor or dealer."

There are no specific provisions with respect to exemptions to the United States or refunds to certain classes of users.

Texas.

H. B. 247, Chap. 44, General Laws of regular session of Forty-Third Legislature, as amended by regular session of Forty-Fourth Legislature, effective May 11, 1935.

TAX: "An occupation or excise tax of four cents" per gallon is imposed on "the first sale" of gasoline in Texas "it being intended to impose the tax at its source in Texas or as soon thereafter as said motor fuel may be subject to pay tax." (Sec. 2.)

REFUNDS: Allowed to any person using gasoline for purposes other than propelling motor vehicles upon state highways (Sec. 13a) and also to everyone exempt from the tax under the Constitution of the State of Texas and of the United States. (Sec. 2c.)

Utah.

Revised statutes 1933, Chap. 12.

TAX: An excise tax of four cents per gallon is imposed upon "the sale or use of all motor fuels sold or used" within the state. (Sec. 57-12-5.)

The act contains no specific provisions concerning exemptions to the United States, or refunds.

Vermont.

Public Laws, Chap. 52.

TAX: A tax of four cents per gallon is levied upon every distributor (defined as one importing motor fuel for use, distribution or sale, or producing or refining same) of gasoline sold or used within the state. (Sec. 1228.)

There are no provisions specifically exempting the United States or providing for any deductions under this act.

Virginia.

Acts 1932, Chap. 212 as amended by Acts 1933, Special Session, Chap. 57, and Acts 1934, Chap. 65.

TAX: The tax imposed by this act is substantially similar to the Nevada act, *supra,* with respect to the features under consideration.

Washington.

Laws 1933, Chap. 58 as amended by Laws 1935, Chap. 109.

The tax imposed by this act is substantially similar to the Nevada act, *supra,* with respect to the features herein considered.

West Virginia.

1931 Official Code of West Virginia, Chap. 11, Art. 14.

TAX: The act imposes an excise tax of four cents per gallon on gasoline and is substantially similar to the Nevada act, *supra,* with the exception that no specific exemption regarding sales of gasoline to the United States is provided.

Wisconsin.

Laws 1933, Chap. 78.

The act with respect to the features under consideration is substantially similar to the Nevada act, *supra.*

Wyoming.

Chap. 115, Art. 11, Wyoming Revised Statutes, 1931, as amended by Chap. 60, Session Laws Wyoming, 1933 Special Session.

TAX: A license tax of four cents per gallon is "levied on all gasoline produced, refined, manufactured, blended or compounded and used within this state and on all gasoline produced, refined, manufactured, blended and compounded and sold or distributed for sale or use within this state, or imported into this state for sale or use therein." (Sec. 115-1102.)

EXEMPTION: There is no provision in the act expressly exempting sales of gasoline to the United States.

REFUND: It is provided that any purchaser or user of gasoline for purposes of operating air crafts may obtain a refund of two cents per gallon upon every gallon of gasoline in excess of ten thousand gallons used per month. (Sec. 115-1103.)

EXHIBIT D.

"*Written opinion of attorney-general protects officer.*—The written opinion of the attorney-general secured by either a state or a county officer legally entitled to secure opinion, shall protect such officer to whom it is directed from liability to either the state, county or other municipal sub-division of the state, because of any official act or acts performed as directed or advised in such opinion." (Section 869, Code of Alabama of 1923.)

FILE COPY

APR 2

No. 727

In the Supreme Court of the United States

OCTOBER TERM, 1935

BIBB GRAVES, AS GOVERNOR OF THE STATE OF ALABAMA, ET AL., ETC., APPELLANTS

v.

THE TEXAS COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	6
Argument:	
I. The Federal Government is immune from taxation by the States	7
II. Whether a state statute constitutes an encroachment upon the immunity of the United States is to be determined from the practical effect of the law in operation	11
III. The Alabama excise tax upon gasoline is in fact a sales tax, the burden of which is shifted to the consumer	13
IV. The tax would retard, impede, and burden the United States in the exercise of its constitutional powers	19
Conclusion	22
Appendix	23

CITATIONS

Cases:	
Burnet v. *Coronado Oil & Gas Co.*, 285 U. S. 393	20
Clallam County v. *United States*, 263 U. S. 341	9
Dawson v. *Kentucky Distilleries Co.*, 255 U. S. 288	13
Edelman v. *Boeing Air Transp.*, 289 U. S. 249	21
Fox Film Corp. v. *Doyal*, 286 U. S. 123	10, 13
Gillespie v. *Oklahoma*, 257 U. S. 501	19, 21
Graysburg Oil Co. v. *Texas*, 278 U. S. 582	14
Gregg Dyeing Co. v. *Query*, 286 U. S. 472	12, 16
Helson & Randolph v. *Kentucky*, 279 U. S. 245	21
Indian Motocycle Co. v. *United States*, 283 U. S. 570	9, 11
Ludwig v. *Western Union Telegraph Co.*, 216 U. S. 146	20
Macallen Co. v. *Massachusetts*, 279 U. S. 620	9
McCulloch v. *Maryland*, 4 Wheat. 316	7
Monamotor Oil Co. v. *Johnson*, 292 U. S. 86	21
Nashville, C. & St. L. Ry. v. *Wallace*, 288 U. S. 249	21
Pan American Petroleum Corp. v. *Alabama*, 67 F. (2d) 590	17
Panhandle Oil Co. v. *Knox*, 277 U. S. 218	14, 15
Postal Telegraph Cable Co. v. *Charleston*, 153 U. S. 692	12

Cases—Continued. Page

Pullman Co. v. *Kansas*, 216 U. S. 56 20
State v. *City of Montgomery*, 228 Ala. 93 ..... 17, 18
Stewart Dry Goods Co. v. *Lewis*, 294 U. S. 550 ..... 13, 16
Telegraph Co. v. *Texas*, 105 U. S. 460 12
Trinityfarm v. *Grosjean*, 291 U. S. 466 11
United States v. *Railroad Co.*, 17 Wall. 322 8
Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1 20
Weston v. *City Council of Charleston*, 2 Pet. 448 7
Wheeler Lumber Co. v. *United States*, 281 U. S. 572 12
Williams v. *City of Talladega*, 226 U. S. 404 12

Statutes:

General Acts of Alabama of 1927, p. 16 23
General Acts of Alabama of 1927, p. 326 24
General Acts of Alabama of 1931, p. 859 25
General Acts of Alabama, Extra Session, 1932, p. 57 26
General Acts of Alabama of 1932, p. 314 27
An Act adopted by the Legislature of Alabama in 1935, approved January 31, 1935 28
Section 348 of the Revenue Act of 1935, adopted by the Legislature of Alabama and approved July 10, 1935:
Schedule 156 29
Schedule 156.1 30
Schedule 156.2 30
Schedule 156.3 31
Schedule 156.9 31
Schedule 156.10 32
Schedule 156.11 32
Schedule 156.14 32
Schedule 156.20 33

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BRIEF ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the United States District Court for the Middle District of Alabama, Northern Division (R. 226–239), is not yet officially reported.

JURISDICTION

The decree of the District Court was entered on December 7, 1935 (R. 224–225), enjoining appellants from collecting the state gasoline tax with respect to sales to the United States. The court

was composed of three Judges, one being a Judge of the United States Circuit Court of Appeals for the Fifth Circuit, and an appeal to this Court was allowed on January 3, 1936, in accordance with the provisions of Sections 238 and 266 of the Judicial Code, as amended (U. S. C., Title 28, Secs. 345 and 380).

QUESTION PRESENTED

Whether officials of the State of Alabama, purporting to act in conformity with authority conferred upon them by the statutes of the State, were erroneously enjoined from imposing and collecting the state excise tax of 6¢ a gallon with respect to gasoline sold to the United States.

STATUTES INVOLVED

These will be found in the Appendix, *infra*, pp. 23–33.

STATEMENT

This brief is submitted on behalf of the United States as *Amicus Curiae*. The interest of the Federal Government in the controversy lies in the fact that a decision sustaining the right of the appellants to the tax would greatly increase the cost of gasoline in Alabama to the United States. On the basis of purchases during the current year, it is estimated that the annual added cost of gasoline would amount to $143,145.54.[1]

[1] Figured by multiplying estimated purchases of current fiscal year in Alabama, 2,385,759 gallons, by present rate of tax sought to be imposed.

Moreover, it is noted that the provisions of the Alabama statutes imposing an excise tax on lubricating oils are similar to the provisions in the statute imposing the tax on gasoline. Then, too, certain counties and cities of the State levy excise taxes upon gasoline, ranging from 1¢ to 3¢ per gallon. Also, if Alabama succeeds in collecting the excise tax herein, a further consideration is the probability that other States will modify their statutes to produce a similar revenue. Such action, it is estimated, would result in an added burden upon the United States amounting to $4,479,661.40 per year.[2]

The use of fuel oil by the Navy Department, which purchased 273,354,228 gallons in 1934, suggests a further source of added revenue to the States and of added expense to the Federal Government, if the validity of this type of legislation be sustained.

The first statute of Alabama imposing a gasoline excise tax was approved February 10, 1923 (R. 2), providing for a tax of 2¢ per gallon upon persons engaged in the sale of this commodity. On January 25, 1927, the tax was increased to 4¢ per gallon. (R. 22–26.) On August 27, 1927, the 1923 Act was materially revised. (R. 3–8.) A further amendment (R. 8, 9) was approved on July 15,

[2] Figured by multiplying estimated purchases of current fiscal year in the United States, 111,991,535 gallons, by an average tax rate of 4¢ per gallon.

1931, relating to the distribution of the proceeds of the tax.

On July 27, 1931, the tax was increased to 5¢ per gallon. (R. 26–31.) Another increase on November 5, 1932 (R. 31–37) brought the tax rate up to 6¢ per gallon. The statutes of July 27, 1931 and November 5, 1932, were repealed on January 31, 1935, but a revised statute (R. 37–44) was enacted providing for a continuation of the tax at the 6¢ level.

On July 10, 1935, the provisions of former laws were consolidated in one statute (see Appendix, *infra,* pp. 29–33, R. 44–45), which imposed a tax of 6¢ per gallon upon all persons selling, distributing, storing, or withdrawing gasoline from storage for any use. The Act provided, however, that sales of gasoline in interstate commerce should be exempt. It was provided that the tax should be imposed only once and that payment by persons selling might be made upon the basis of sales.

Existing contracts between the Texas Company and the United States (R. 145–221) which will expire shortly, provide that the sale price of gasoline shall not include any state excise tax.

Sales to the United States are made principally from plaintiff company's Mobile terminal and bulk stations, but deliveries are also made through retail service stations. (R. 128.) Proceeding under an opinion of a former Attorney General of the State of Alabama, addressed to the State Tax Com-

mission in a letter dated August 22, 1928 (R. 54–58), to the effect that motor vehicle fuels sold to the United States were exempt from taxation under Alabama statutes, the Texas Company has not paid a tax upon gasoline sold to the Federal Government since 1928.

On June 17, 1935, a telegram (R. 12–13) was sent by the State Tax Commission to the Texas Company, demanding payment of the state excise tax plus interest and penalty on 1,300,000 gallons of gasoline withdrawn from storage for sale to the United States. On July 5, 1935, the Attorney General of the State of Alabama rendered an opinion (R. 59–69) to the State Tax Commission, holding that all persons engaged in the business of selling, distributing, or storing gasoline must pay the state excise tax, whether or not purchased by the United States. On August 30, 1935, the State Tax Commission advised the Texas Company by letter (R. 13–14) that it was not entitled to exemption on gasoline sold to the United States or Federal agencies.

The decision of the lower court was based upon an agreed statement of facts (R. 110–221), which recited among other things that the appellants intended to collect or attempt to collect the tax unless restrained by judicial order.

The appeal will be considered in this brief only on the assumption that an injunction is an appropriate remedy under the particular circumstances

of this case. Similarly, the United States is not interested in any question concerning past transactions or whether appellants are estopped from recovering the tax on sales already made, since there appears no logical basis whereby the burden of the tax on gasoline previously sold might be shifted to the Federal Government.

SUMMARY OF ARGUMENT

That the Federal Government is immune from taxation by the States is a fundamental concept of our constitutional system of dual governments that has been uniformly recognized. The immunity extends to every appropriate agency for a governmental purpose. In determining whether a state statute imposing taxes is an encroachment upon the immunity of the United States, the practical effect of the law in operation as applied and enforced by the State controls.

The Alabama excise tax upon gasoline operates as a sales tax, the burden of which is shifted to the consumer, being measured by the number of gallons sold or withdrawn for use. The collection of the tax with respect to gasoline sold to the United States would retard, impede and burden the Federal Government in the exercise of its constitutional powers. It is therefore unconstitutional, and it is immaterial whether the tax be described as a sales tax, a privilege tax or a property tax.

ARGUMENT

I

THE FEDERAL GOVERNMENT IS IMMUNE FROM TAXATION BY THE STATES

The sole question in the present litigation in which the Federal Government is interested is whether the long established and fundamental principle of constitutional law which has grown up with our system of dual governments, involving the relations between the sovereignties of the United States and of the States, whereby the one refrains from interference with the other in the recognized orbits of their respective constitutional powers, shall be continued.

Taxation by the States of the instrumentalities of the Federal Government, engaged in public and governmental functions, has been recognized as inconsistent with our system of government, as shown by a long line of decisions from the earliest days of the Republic. As stated in *McCulloch* v. *Maryland,* 4 Wheat. 316, 435:

> * * * the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.

The principle was applied in *Weston* v. *City Council of Charleston,* 2 Pet. 448, in an opinion

handed down by Chief Justice Marshall, which stated (p. 468):

> The right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government; to any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

A further recognition of the doctrine is found in *United States* v. *Railroad Co.*, 17 Wall. 322, denying the right of the United States to tax the interest from railroad bonds owned by the City of Baltimore. It is there stated (pp. 327–328):

> The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other.

More recently, the doctrine of immunity is discussed in *Clallam County* v. *United States,* 263 U. S. 341, in which Justice Holmes commented as follows (p. 344):

> The immunity is claimed under the Constitution of the United States. It is true that no specific words forbid the tax, but the prohibition established by *McCulloch* vs. *Maryland,* 4 Wheat. 316, was established on the ground that the power to tax assumed by the State was in its nature "repugnant to the constitutional laws of the Union" and therefore was one that under the Constitution the State could not use. * * * The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words.

Also, the following excerpt from *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, is worthy of note (p. 628):

> Not only may the power to tax be exercised oppressively, but for one government—state or national—to lay a tax upon the instrumentalities or securities of the other is derogatory to the latter's dignity, subversive of its powers, and repugnant to its paramount authority.

In *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, in connection with the attempt by the United States to tax the purchase price of motorcycles bought by a municipal corporation for its

police department, the opinion of Justice Van Devanter said (p. 575):

> It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. * * * Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute.

A succinct statement of the doctrine may be found in the opinion by Chief Justice Hughes in *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 128:

> The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland*, 4 Wheat. 316, 436), and the immunity does not extend "to anything lying outside or beyond governmental functions and their exertions." *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon an "entire absence of power" (*Johnson* v. *Maryland*, 254 U. S. 51, 55, 56),

> but it does not exist "where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government." *Willcuts* v. *Bunn*, 282 U. S. 216, 225.

The decision in *Indian Motocycle Co.* v. *United States, supra,* is cited as authority in *Trinityfarm* v. *Grosjean,* 291 U. S. 466, 471:

> Its application does not depend upon the the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them.

Illustrations of the application of the doctrine of immunity are numerous, but it is believed that further citations would be superfluous.

II

WHETHER A STATE STATUTE CONSTITUTES AN ENCROACHMENT UPON THE IMMUNITY OF THE UNITED STATES IS TO BE DETERMINED FROM THE PRACTICAL EFFECT OF THE LAW IN OPERATION

Appellants urge that Alabama statutes impose a tax upon designated persons for the privilege of storing gasoline, measured by the number of gal-

lons withdrawn from storage. It is alleged that the tax accrues upon withdrawal of the gasoline. In other words, appellants contend that it is an occupational tax.

In *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, a case involving a tax upon the storage of gasoline, Chief Justice Hughes stated (p. 476):

> In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the State. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 509, 510.

A transportation tax, measured by transportation charges, was deemed from the practical effect of the law in operation, a tax upon the vendor, since the property was shipped at his risk, in *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572.

Consistent with this decision may be noted those involving telegrams, such as *Telegraph Co.* v. *Texas*, 105 U. S. 460, which held that a state tax upon telegrams was unconstitutional with respect to messages sent by the United States. To the same effect, see *Postal Telegraph Cable Co.* v. *Charleston*, 153 U. S. 692, and *Williams* v. *City of Talladega*, 226 U. S. 404.

In *Fox Film Corp.* v. *Doyal, supra* (p. 126), a tax laid "upon the privilege of engaging in certain occupations", measured by the gross receipts from the licensing of copyrighted motion pictures, although sustained because copyrights are not Federal instrumentalities, was held to be a direct charge on the royalties,

Justice Roberts, in *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550, stated (p. 555):

> In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect. "The substance and not the shadow determines the validity of the exercise of the power."

In *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, the Court disregarded the designation by the State and held that a tax of 50¢ per gallon on whiskey, although described as an annual license tax upon persons engaged in the business of owning and storing whiskey, was essentially a property tax.

III

THE ALABAMA EXCISE TAX UPON GASOLINE IS IN FACT A SALES TAX, THE BURDEN OF WHICH IS SHIFTED TO THE CONSUMER

Since the United States is immune from taxation by the States, and the constitutionality of tax statutes is determined by their practical effect in operation, we come then to the crux of the controversy, namely, what is the practical effect of the Alabama

excise tax. The appellants argue from the phraseology of the statutes that it is an occupational tax imposed for the privilege of storing gasoline. We submit that, considering the practical effect of the tax, as enforced and applied by the State, it is a sales tax.

That an excise tax is unconstitutional and void as applied to sales of gasoline to the United States is decided in *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218. An extract from the opinion of Justice Butler in that case states (p. 222):

> To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. * * * And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State.
>
> The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled.

Upon the authority of that case, the Supreme Court of the State of Texas was reversed in *Graysburg Oil Co.* v. *Texas,* 278 U. S. 582, in a *per curiam* decision.

It is not disputed that the Alabama tax is measured by the number of gallons of gasoline withdrawn from storage for sale or use. However, the storage of any particular gasoline may continue indefinitely and the storer incures no tax liability.

Gasoline may be withdrawn from storage and placed in storage in another locality within the State and no tax accrues. No liability for the tax attaches with respect to gasoline which evaporates, is stolen, or destroyed, regardless of the fact that it may have been stored and withdrawn from storage. It is specifically provided that any particular gasoline is subject to the tax but once, even though it may have been stored many times and by different distributors or dealers. Persons who sell the commodity are permitted to pay the tax upon the basis of sales.

Further support for our contention that Alabama is attempting in reality to tax the sale or use and not the occupation, is found in the provision which exempts gasoline used in interstate commerce. If the tax is primarily levied for the privilege of storing the commodity, it is difficult to understand why the *use* is the basis for granting an exemption. The practical effect of deferring payment of the tax until the time of sale or withdrawal for use, results in the administration of the law as a sales tax.

That the burden of the Alabama tax falls upon the consumer, which was the chief objection to the sales tax in *Panhandle Oil Co.* v. *Knox, supra,* is not open to question. By the method of measuring the tax, of collecting it but once, and then only upon gasoline sold or used, the burden of the tax is shifted in its entirety to the purchaser or user. The impossibility of dealers or distributors absorbing the tax is obvious.

In *Gregg Dyeing Co.* v. *Query, supra,* this Court considered what purported to be a storage tax upon gasoline, and held that the practical effect of the law in operation was to tax the consumer or user. An excerpt from the opinion of Chief Justice Hughes follows (p. 480):

> Reading together the statutes with respect to gasoline taxes, the state court took the view that as to the gasoline tax with respect to sales within the State, the burden actually rests upon the consumer, although not placed upon the consumer directly. No reason is found to challenge this view. *Texas Company* v. *Brown, supra,* at p. 479; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 222; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 579.

Again, in *Stewart Dry Goods Co.* v. *Lewis, supra,* the opinion of this Court cites authorities indicating clearly that a tax and its burden must be considered together (p. 556):

> In *Brown* v. *Maryland,* 12 Wheat. 419, a tax on the occupation of an importer was held a tax on imports obnoxious to the commerce clause. Said the court (p. 444): "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. * * * All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself." In *Cook* v. *Pennsylvania,* 97 U. S. 566, a tax on the amount of an auctioneer's sales was declared a tax on the goods sold. In *Crew Levick Co.* v. *Pennsylvania,* 245 U. S.

> 292, a state tax on the business of selling goods in foreign commerce, measured by gross receipts from goods so sold and shipped, was pronounced an impost upon exports. The court said (p. 297): "* * * nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions."

Since the mere withdrawal of gasoline can happen repeatedly without a tax accruing, and the obligation of the tax is incurred only upon withdrawal from storage for sale or use, it follows that the withdrawal is merely a necessary and formal incident and that in substance it is the sale or use which is taxed.

In view of the foregoing, it is difficult to reach any other conclusion than that a tax which resembles a sales tax and operates as a sales tax is in fact a sales tax.

Appellants cite *Pan American Petroleum Corp.* v. *Alabama,* 67 F. (2d) 590 (C. C. A. 5th), and *State* v. *City of Montgomery,* 228 Ala. 93, as authority for their position that Alabama statutes impose an occupational tax. The former case holds correctly that certain post exchanges located at Army camps in Alabama were not instrumentalities of the United States Government and therefore were not exempt from the state gasoline tax. Dicta in

the opinion, if intended to mean that the excise tax was not upon the sale but upon the storage of the commodity, was not necessary to the result. Moreover, it is doubtful if Judge Bryan, of the Circuit Court of Appeals for the Fifth Circuit, intended to make the distinction now contended for by counsel for appellants that the State might not tax the sale, but might tax the withdrawal from storage of gasoline, a necessary incident to the sale. The following quotation from the opinion indicates that this distinction was not considered (p. 590):

> We need consider only the tax in respect of sales of gasoline, for it is admitted that if it is collectible, the tax on sales of the other petroleum products is likewise collectible.

The case of *State* v. *City of Montgomery, supra,* held that cities of Alabama were not persons liable for the state excise tax upon gasoline, under the wording of the statute. Accordingly, in 1935, the wording of the statute was changed so that cities would not be exempt.[3] It is submitted that the issue herein was not squarely presented, and anything in the opinion characterizing the tax should be considered as dicta and not controlling.

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[3] It may be noted that the Attorney General's opinion purports to change the effect and operation of statutes after a contrary interpretation and application for many years, although no substantial change was made in the language of the statutes. Had there been any intention to change the application and effect of the law, it is believed the legislature would have manifested such intention in clear and unequivocal language.

We think the court below properly considered the question concerning the immunity of the United States as controlling.

IV

THE TAX WOULD RETARD, IMPEDE, AND BURDEN THE UNITED STATES IN THE EXERCISE OF ITS CONSTITUTIONAL POWERS

Although, in our opinion, the Alabama tax operates as a sales tax, we submit that in determining whether a state tax constitutes an encroachment upon the sovereignty of the United States, it is immaterial whether the tax is a sales tax, an occupational tax or a property tax. The real question is whether the collection of the tax would retard, impede, or burden the United States in the exercise of its constitutional powers.

Counsel do not deny that a sales tax would be invalid with respect to gasoline sold to the United States. Nor is it to be denied that upon expiration of present contracts, the cost of gasoline to the United States will be increased by the amount of the tax if exemption is not allowed.

The jealous care with which the principle of mutual independence and non-interference between the States and the Federal Government is safeguarded, is well illustrated in *Gillespie* v. *Oklahoma*, 257 U. S. 501. The question there concerned the right of the State to tax income from leases of Indian lands. It was held that the leases were instrumentalities of the United States and that the tax would hamper the effort of the Federal Gov-

ernment to make the best possible terms for its wards.

The converse of that case is found in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, in which the Federal Government was denied the right to tax income from leases by the State of Oklahoma of land held by the State for the support of its schools.

Judge Hutcheson, in his dissenting opinion below, notes the purposes for which state gasoline excise taxes are levied. Surely, if the United States is entitled to exemption, the fact that the State uses its gasoline taxes for highways and schools cannot validate an invalid tax. He comments upon the possibility that some of the agencies of the United States might not be exercising purely governmental functions. We think these matters are irrelevant to the determination of the present proceeding. Presumably, gasoline purchased by the United States is for its use in the exercise of its constitutional powers.

Certain interstate commerce cases may be mentioned as having some analogy to the question involved herein. In 1910, three interstate commerce cases were decided: *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1 *Pullman Co.* v. *Kansas*, 216 U. S. 56 and *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, which cases settled the doctrine that a state tax on a proper subject may nevertheless be an encroachment on Federal authority. Justice Harlan said, in *Western Union Telegraph Co.* v. *Kansas, supra* (p. 27):

> But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things.

Some later cases which may be noted are *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86; *Edelman* v. *Boeing Air Transp.,* 289 U. S. 249; *Helson & Randolph* v. *Kentucky,* 279 U. S. 245; *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249. A distinction in the application of the rule in those cases and in the instant case is, as stated by Justice Holmes in *Gillespie* v. *Oklahoma, supra* (p. 505):

> The criterion of interference by the States with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws. (Citing cases.) The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance.

The suggestion by appellants that the United States might be able to avoid payment of the tax by purchasing gasoline which has not been stored and withdrawn from storage in the State is beside the point. While it is true that the Government might do so if the tax were levied by this State alone, in the event other States should follow the lead of Alabama, it would be impossible to avoid the burden of the tax. Moreover, it is maintained that the Federal Government cannot be required to devise schemes which are inconvenient and burdensome in order to avoid payment of a tax levied for the benefit of a State.

CONCLUSION

We submit that the decree below should be affirmed, upon the ground that the effect of imposing and collecting the Alabama excise tax with respect to gasoline sold to the United States would be to impose a burden upon the Federal Government in the exercise of its sovereign powers.

Respectfully submitted.

STANLEY REED,
Solicitor General.
ROBERT H. JACKSON,
Assistant Attorney General.
DAVID E. HUDSON,
SEWALL KEY,
JOHN M. HUDSON,
PAUL R. RUSSELL,
Special Assistants to the Attorney General.

APRIL 1936.

APPENDIX

General Acts of Alabama of 1927, p. 16:

Be it enacted by the Legislature of Alabama, That:

* * * * *

SECTION 2. Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the selling, distributing or withdrawing from storage for any use gasoline as herein defined in this State, provided however that this excise tax shall not be levied upon the sale of gasoline in interstate commerce, and provided further that where the excise tax of two cents per gallon upon the sale of such gasoline shall have been paid by a distributor or by a retail dealer or storer such payment shall be sufficient, the intention being that the tax shall not be paid but once.

SECTION 3. The excise tax imposed by section two hereof shall apply to persons, firms, corporations, dealers or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals be for sales or other use; provided, that "sellers" of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions.

* * * * *

Approved Jan. 25, 1927.

General Acts of Alabama of 1927, p. 326:

Be it enacted by the Legislature of Alabama:

* * * * *

SECTION 3. (a) That Section 2 of the above mentioned act, approved Feb. 10, 1923, shall be made to read as follows: Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the selling, distributing or withdrawing from storage for any use gasoline as herein defined in this State, provided however that this excise tax shall not be levied upon the sale of gasoline in interstate commerce, and provided further that where the excise tax of two cents per gallon upon the sale of such gasoline shall have been paid by a distributor or by a retail dealer or storer such payment shall be sufficient, the intention being that the tax shall not be paid but once. (b) The excise tax imposed by subdivision (a) of this section shall apply to persions, firms, corporations, dealers or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals be for sales or other use—provided, that "sellers" of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions.

* * * * *

Approved August 27, 1927.

General Acts of Alabama of 1931, p. 859:

Be it enacted by the legislature of Alabama:

* * * * *

SECTION 2–A. Every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of one cent per gallon in addition to all other excise tax now imposed by law upon the selling, distributing or withdrawing from storage for any use, gasoline as herein defined in this State; said one cent excise tax shall be collected as now provided by law for the collection of gasoline excise tax and when collected, less the expense of collecting, shall be paid into the State Treasury to the credit of the State Highway Department for the purposes set forth in this Act until October 1, 1932, after which time the same when collected shall be paid to the County Treasurer or the depository of the several counties in equal shares for a period of three years, to be used exclusively by said counties in constructing and maintenance of public roads and bridges within the several counties. Where the excise tax herein provided shall have been paid by a distributor or retail dealer or storer, such payment shall be sufficient, the intention being that the tax levied by this Act shall not be paid but once. Provided, however, that at the end of three years period provided for herein for said excise tax to be paid to the counties said excise tax shall thereafter be no longer collected * * *.

* * * * *

Approved July 27, 1931.

General Acts of Alabama, extra session, 1932, p. 57:

Be it enacted by the Legislature of Alabama:

* * * * *

SECTION 6. ISSUANCE OF LICENSE AND POWER TO REVOKE SAME; NONTRANSFERABILITY OF LICENSE.—Upon approval of the bond required, as hereinbefore provided, the State Tax Commission shall issue a license authorizing the distributor to engage in the business of selling, distributing and withdrawing from storage, gasoline, but said license may be revoked by the State Tax Commission at any time upon ten days' written notice to the distributor if the distributor shall fail to comply with any of the provisions of this Act, or to pay within the time required by law all excise taxes and penalties required to be paid by such distributor. The license herein authorized to be issued shall be a personal privilege, and shall not be transferable.

SECTION 7. PENALTIES.—Any person who shall engage in the business, for which a license is herein provided, without having a license as herein required, shall forfeit all right to sell, distribute, or withdraw from storage, gasoline in the State of Alabama for a period of one year. Each person engaging in the business of selling, distributing or withdrawing from storage gasoline without first obtaining and having a license therefor as herein required shall be guilty of a misdemeanor, and upon conviction, be fined not less than two hundred fifty or more than five hundred dollars, or imprisoned for a term of not less than thirty or more than one hun-

dred eighty days, or both, at the discretion of the Court.

* * * * *

Approved October 5, 1932.

General Acts of Alabama of 1932, p. 314:

Be it enacted by the Legislature of Alabama:

* * * * *

SECTION 2. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of one cent (1¢) per gallon upon the selling, distributing, or withdrawing from storage for any use gasoline as herein defined in this State, provided however that this excise tax shall not be levied upon the sale of gasoline in interstate commerce, and provided further that where the excise tax of one cent (1¢) per gallon upon the sale of such gasoline shall have been paid by the distributor, refiner, or by retail dealer or storer such payment shall be sufficient, the intention being that the tax shall be paid but once.

SECTION 3. The excise tax imposed by Section 2 hereof shall apply to persons, firms, corporations, dealers, refiners or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided, that "sellers" of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions.

* * * * *

Approved November 5, 1932.

An act adopted by the Legislature of Alabama in 1935, approved January 31, 1935:

Be it enacted by the Legislature of Alabama:

* * * * *

SECTION 2. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents (2¢) per gallon upon the selling, distributing, or withdrawing from storage for any use gasoline as herein defined in this State, provided however that this excise tax shall not be levied upon the sale of gasoline in interstate commerce, and provided further that where the excise tax of two cents (2¢) per gallon upon the sale of such gasoline shall have been paid by the distributor, refiner, or by retail dealer or storer such payment shall be sufficient, the intention being that the tax shall be paid but once.

SECTION 3. The excise tax imposed by Section 2 hereof shall apply to persons, firms, corporations, dealers, refiners, or distributors storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided that "sellers" of gasoline and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions.

* * * * *

SECTION 19. That the levy of the one cent tax as provided and levied under the provisions of an act * * *. Approved July 27, 1931," be and the same is hereby sus-

pended as of and on February 1, 1935, and all other provisions of said act shall remain and be in full force and effect until the full payment of the amount due thereunder is paid in full and thereafter said act is hereby repealed. That the levy of the one cent tax as provided and levied under the provisions of an act * * *. Approved November 5, 1932", be and the same is hereby suspended as of and on February 1, 1935, and all other provisions of said act shall remain and be in full force and effect until the full payment of the amount due thereunder is paid in full and thereafter said Act is hereby repealed.

* * * * *

Approved January 31, 1935.

Pertinent schedules of section 348 of the Revenue Act of 1935 adopted by the Legislature of Alabama and approved July 10, 1935:

SCHEDULE 156. As used in this Chapter, the term "gasoline" shall include gasoline, naptha and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines; provided, however, that nothing in this Chapter shall be held to apply to those products known commercially as "kerosene oil", "fuel oil", or "crude oil" commonly used for lighting, heating, or industrial purposes. The word "person" means and includes persons, corporations, co-partnerships, companies, counties, municipal corporations, school boards, or agencies of the State, or other agencies, associations, incorporated or otherwise, singular or plural. The term "distributor" shall include any person who engages in the selling of gasoline in this State by wholesale

domestic trade, but shall not apply to any transaction of such distributor in interstate commerce. The word "refiner" shall include any person who manufactures, distills, blends, compounds or mixes any one or more products in the production of a liquid motor fuel as herein defined. The term "retail dealer" shall include any person herein defined as distributor who is also engaged in the selling of gasoline in this State at any place in this State in broken quantities. The term "storer" as herein used shall include any person who ships or causes to be shipped or received, gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same for any purpose.

SCHEDULE 156.1. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline as herein defined, provided, however, that this excise tax shall not be levied on the sale of gasoline in interstate commerce, and provided further, that where the excise tax of six cents ($0.06) per gallon upon the sale, distribution, storage or withdrawal from storage of such gasoline shall have been paid by a distributor, refiner, or by retail dealer or storer, such payment shall be sufficient, the intention being that the tax shall be paid but once.

SCHEDULE 156.2. The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or

other use; provided that "sellers" of gasoline and its substitute paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions.

SCHEDULE 156.3. On or before the twentieth day of each month after this Chapter shall have taken effect, every person upon whom this excise tax is levied, shall render to the State Tax Commission on forms prescribed by such Commission, a true and correct statement of all sales and withdrawals of gasoline made by him or them during the next preceding calendar month, and shall furnish the said Commission such other information as such Commission may demand and/or require, upon blanks to be formulated and furnished by said Commission, and at the time of making such monthly report shall pay to the State Tax Commission an amount of money equal to the excise tax herein levied.

* * * * *

SCHEDULE 156.9. One-third of the proceeds of the excise tax herein imposed, less cost of collection and administering this Chapter, shall be paid into the State Treasury to the credit of the sixty-seven counties of the State, and shall be divided and distributed equally among the sixty-seven counties of this State, payment to be made by State warrant to be mailed to the Treasurer of such counties or depositories of such counties, on or before the 10th day of each month following collection. Such funds when received by the County Treasurer shall be covered into the County road and bridge fund, and shall be expended exclusively in

the construction, maintenance and repair of the public roads and bridges in such County. * * *.

SCHEDULE 156.10. One-third of the proceeds of the excise tax herein imposed, when collected, shall be covered into the State Treasury to the credit of the public road and bridge fund. * * *.

SCHEDULE 156.11. One-third of the excise tax herein imposed, when collected, shall be divided, monthly as collected, less the cost of collection, as follows: One half of said ⅓ shall be paid into the State Treasury to the credit of the State Highway Department for the public road and bridge fund, * * *; and the other one half of said ⅓ shall be divided equally among the 67 counties of the State of Alabama, monthly as collected, less the cost of collection, payment to be made to the County Treasurer or Depository of said counties on or before the 10th day of each month of the year, * * *.

* * * * * *

SCHEDULE 156.14. If any distributor, refiner, storer or retail dealer in gasoline covered by this Chapter shall fail to make the monthly returns prescribed herein and pay the excise tax hereby laid, on or before the 20th day of the month following sale, distribution or withdrawal, the State Tax Commission shall make return for such delinquent upon such information as it may reasonably obtain, assess the excise tax thereon, and add a penalty for failure to make such return and pay the tax herein laid of twenty-five per cent (25%) of the tax due, to the amount as assessed by the Commission. If, in the opinion of the State Tax Commission, a good and sufficient cause or reason is shown for such delinquency, the

State Tax Commission may remit the penalty, otherwise the penalty shall be paid.

* * * * *

SCHEDULE 156.20. All laws and parts of laws in conflict with the provisions of this Chapter are hereby repealed, provided that nothing in this Chapter shall be held or construed to repeal any part of Act 55, approved October 5th, 1932, Acts, Special Session, 1932, page 57. Provided further that nothing herein contained shall be held or construed to repeal any law heretofore enacted providing for the collection of excise tax on the sale, distribution or withdrawal of gasoline from storage in this State until all such taxes accrued prior to the effective date of this Chapter shall have been collected.

U. S GOVERNMENT PRINTING OFFICE: 1936

SUPREME COURT OF THE UNITED STATES.

No. 727.—October Term, 1935.

Bibb Graves, as Governor of the State of Alabama; et al., Appellants, *vs.* The Texas Company.	Appeal from the District Court of the United States for the Middle District of Alabama.

[May 18, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

Appellee brought this suit against appellants, officers of the State of Alabama, to restrain the collection under statutes of that State of taxes in respect of gasoline and other liquid motor fuels—which for brevity we shall call "gasoline"—sold to the United States and used by it in performing governmental functions. Plaintiff applied to the court of three judges for a temporary and a permanent injunction. After hearing on an agreed statement of facts, the court held that the Alabama statutes assailed are not distinguishable from the Mississippi exaction condemned as unconstitutional in *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, and granted a permanent injunction. 13 F. Supp. 242. The governor and the other state officers appealed. 28 U. S. C., § 345. The United States, by brief filed here as amicus curiae, presented its argument asking affirmance on the ground that the taxes impose a burden on sales to it.[1]

In substance the Alabama statutes[2] provide: The Act of February 10, 1923, (not here involved) required every distributor and retail dealer to pay an excise tax of two cents per gallon "upon the sale" of gasoline. A distributor is one who sells gasoline at wholesale. A retail dealer is a distributor who also sells gasoline in

[1] The government's brief states: On the basis of purchases in Alabama during the current year, it is estimated that the total annual added cost of gasoline would amount to $143,145.54. If Alabama succeeds in collecting the tax, other States will probably modify their statutes to produce a similar revenue; it is estimated that this would add a burden of $4,479,661.40 per year upon the United States. That figure is arrived at on the basis of four cents a gallon. The use of fuel oil by the Navy Department, which purchased 273,354,228 gallons in 1934, suggests a further burden on the United States.

[2] Enacted July 10, 1923, Gen. Acts 1923, p. 36, and amended August 27, 1927, Gen. Acts 1927, p. 326; January 25, 1927, Gen. Acts 1927, p. 16; July 27, 1931, Gen. Acts 1931, p. 859; November 5, 1932, Gen. Acts 1932, p. 314; January 31, 1935, Gen. Acts 1935, p. 30; July 10, 1935, Gen. Acts 1935, p. 508.

broken quantities. The Act of January 25, 1927, required every distributor, retail dealer "or storer" to pay two cents per gallon "upon the selling, distributing or withdrawing from storage for any use". A storer is one "who ships gasoline into this State . . . and stores the same and withdraws or uses the same for any purpose". The Act of August 27, 1927, amending that of 1923, employed the same form of words to define the exaction and made a total tax of four cents upon selling, distributing or withdrawing for any use. The Act of July 25, 1931, added a cent and that of November 5, 1932 added another. The Act of January 31, 1935, repealed the 1931 and 1932 statutes and, in lieu of the excises laid by them, imposed one of two cents. The Act of July 10, 1935, repealed all the Acts then in force and in their place enacted that "Every distributor, refiner,[3] retail dealer or storer of gasoline . . . shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline . . ."

All the Acts here involved declare that the excise shall not be laid upon sales in interstate commerce and that the specified tax shall be paid but once. They make the excise apply whether "withdrawals be for sale or other use", declare that sellers may pay on the basis of their sales and require that others upon whom the excise is laid shall compute and pay the tax on the basis of their withdrawals. All must make monthly return of "sales and withdrawals" and preserve records of "sales, distributions or withdrawals." Anyone who shall violate any provision may be restrained "from distributing, refining, selling or withdrawing from storage any gasoline, the sale or withdrawal of which is taxable".

Appellee is a Delaware corporation, authorized to do business in Alabama. It sells gasoline in the 67 counties of that State. Gasoline refined at Port Arthur, Texas, is transported by barges to the company's terminals at Mobile, Alabama, and Pensacola and Millville, Florida. Gasoline sold in Alabama is delivered from the Mobile terminal or the company's bulk plants in that State to which gasoline is shipped from the terminals and at which it is held in tanks until withdrawn for delivery at the plants to customers or for transportation to service stations where it is sold at retail to the public.

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[3] The term "refiner" first appears in the 1932 Act; it has no application to this case.

Practically all the gasoline received by the United States from the company in Alabama is sold and delivered pursuant to written contracts. Some provide for deliveries at the Mobile terminal, some at bulk plants and some at service stations. The deliveries from the Mobile terminal are made in railroad tank cars on tracks adjacent to the terminal. Gasoline delivered from bulk plants is that shipped from the terminals and stored in tanks at the plants until withdrawn. That delivered from service stations is shipped from the terminals to bulk plants and thence conveyed to the stations.

The United States requires that prices specified in bids and contracts shall be exclusive of state and municipal taxes. Between January 1, 1930, and September 22, 1935, the company sold and delivered to the United States in Alabama 286,639.36 gallons of gasoline. At the time of the trial, there were in force two contracts for sale and delivery of gasoline by the company to the United States in Alabama. One covered the period from October 1 to December 31, 1935, and called for deliveries at the Mobile terminal for the United States Army and the Tennessee Valley Authority. The other covered the period from October 1, 1935, to June 30, 1936, and called for service station deliveries for the Department of the Interior.

March 22, 1923, the attorney general of Alabama ruled that sales to the United States were taxable under the 1923 Act. But, after our decision May 14, 1928, in the *Panhandle* case, the attorney general, August 22, 1928, held that the Alabama statutes then in force (those enacted in 1927) were not distinguishable from that of Mississippi held repugnant to the federal constitution in the *Panhandle* case. He said: "Alabama also [in addition to taxing selling] taxes the distributing or withdrawing from storage for any use. It taxes but once, and where there is a sale, the tax is on the sale. Where there is no sale, but a distribution or withdrawing from storage for some use, other than selling, there is a tax on such withdrawal or distribution. We are not here considering such withdrawals, but only sales to the United States."

That construction was accepted by the state taxing officers and followed until July 5, 1935, when the then attorney general advised the tax commission that the taxes levied under the Acts of 1927, 1931 and 1932 were essentially different in character from those condemned in the *Panhandle* case. His ruling did not de-

pend upon or result from the statutes enacted after 1927. He held the taxes were laid not upon sale but upon storage and subsequent withdrawal, accruing at the time of withdrawals, and to be computed upon the basis of withdrawals. He said that "so far as purchases of gasoline by the United States Government are concerned, these tax acts in question do not impose a burden upon the United States. . . . . True it may be that the effect of these taxes may be to increase the price of the commodity which the Federal Government may desire to purchase."

The company has not reported for taxation or paid any tax under these Acts on gasoline sold to the United States since the attorney general's ruling of August 22, 1928. On August 30, 1935, the commission informed appellee that it could not "permit deductions from gasoline sales by reason of gallonage sold to the United States." And, prior to the bringing of this suit, the State made demand for taxes upon all gasoline withdrawn and sold in Alabama during the preceding five years.

Appellants say that, upon the privilege of storing gasoline, the company is subject to a tax accruing upon and measured by the amount withdrawn, irrespective of subsequent sale or use. Upon that basis they maintain that the tax in respect of gasoline sold and delivered by the company to the United States is not one that operates to retard, impede or burden the exercise by the United States of its constitutional functions.

But mere storing, i. e., that unassociated with selling, distributing or withdrawing from storage, was not taxable under prior laws and is not taxable under the Act of July 10, 1935 now in force. While a storer is subject to excise in the Act of January 25, 1927 and subsequent statutes, storing without more is not enough to make one a storer. To be a storer, one must ship into the State and there store and withdraw gasoline for some use. Storing was not included among the acts or things taxed until the Act of July 10, 1935. That Act supersedes and consolidates the earlier levies. We read its taxing clause with its other provisions that in substance were taken from the earlier statutes. In all the measures involved, it unmistakably appears—and it is conceded by the taxing officers—that one who has paid a tax on selling is not taxable on distributing, storing or withdrawing from storage. The opinion of the attorney general, August 22, 1928, rightly held that the State taxes but once and, where there is a sale, the tax is on the sale.

The purpose of the statutes subsequent to that of 1923 was to reach gasoline which was used but not sold within the State. But, excepting only the addition of the word "storing" in the taxing clause of the Act of July 10, 1935, there is nothing to suggest intention to tax "storing" as such. Other provisions indicate that it was not the purpose so to tax. In all the Acts, it is stated: The excise shall apply whether the withdrawal be for "sale or other use"; sellers may pay on the basis of their sales but others shall pay on the basis of their withdrawals; all shall report their "sales and withdrawals" and keep records of the "sales, distributions or withdrawals"; violators of the Act may be restrained from distributing, refining, selling or withdrawing from storage (but not from storing) gasoline, the "sale or withdrawal" of which is taxable. Omission of storing from these and all other provisions relating to ascertainment of amount or enforcement of the taxes imposed tend strongly to negative intention to tax storing as such.

There are other indications that storing alone was not intended to be taxed. The tax commission has never required, and distributors, retail dealers and storers have not made, reports in respect of gasoline until it passes from seller to purchaser or until withdrawn for use. The State has never claimed a tax upon storing of gasoline withdrawn for sale and delivery in interstate commerce. In the absence of withdrawal, there is no tax no matter how long gasoline is stored. The amount at any time received or held in storage is immaterial. The tax depends solely upon the amount withdrawn. No notice is taken of losses by evaporation or otherwise, or of storing for hire or of storing after taxable sale, distribution or withdrawal for use. Clearly, storing alone is not the thing taxed; withdrawing is essential. *Ervin* v. *State of Alabama*, 80 F. (2d) 432. *Pan American Petroleum Corporation* v. *State of Alabama*, 67 F. (2d) 590. *State* v. *City of Montgomery*, 228 Ala. 93, 95. *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 293.

But, assuming that, by the Acts under consideration the State meant to tax mere storing, that purpose cannot be given effect in respect of the company's sales and deliveries to the United States without infringing the constitutional principle which safeguards the federal government against state taxation. Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so

essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat "a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing." *Brown* v. *Maryland*, 12 Wheat. 419, 444. As held in the *Panhandle* case (p. 222): "A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. . . . The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons." So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawal so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional.

Appellants suggest that appellee has an adequate remedy at law and therefore may not resort to equity.

It was required to give a bond and obtain a license to carry on its business. Section 6, Act of October 6, 1932, Gen. Acts 1932, p. 57. It is required monthly to report and pay taxes to the tax commission for the previous month. Act of July 10, 1935, schedule 156.3.[4] All, including amounts paid under protest, are by the commission handed over to the state treasurer who retains half and distributes the other half equally among the counties. Sch. 156.9-156.11. Failure for any month so to report is punishable by fine from $50 to $300, sch. 156.7, and the commission is required to fix the amount of the tax and to impose a penalty of 25%, sch. 156.14. And, in the absence of satisfactory showing by the company to the contrary, the commission may revoke its license, § 6, *supra*, and issue summary execution against its bond and property. The tax and penalties constitute a debt to the State and a lien upon all its property prior to all others save earlier liens for state taxes. Sch. 156.15. Appellants assume that suit to collect the taxes claimed is the only procedure contemplated. But that assumption is without support in the record. They have not bound themselves to refrain from doing anything that the statute empowers them to do to enforce payment of the taxes claimed. It does not appear that

[4] The same provisions are found in the statutes repealed by the Act of July 10, 1935.

they are authorized so to bind themselves. In the absence of injunction against them, appellee, failing to pay the taxes they demand, is liable to be proceeded against in accordance with the state law.

November 22, 1928, the attorney general of Alabama advised the attorney general of the United States that Alabama had no statute authorizing refund of taxes that had been collected upon sales of gasoline to the United States. January 28, 1935, the gasoline department of the tax commission wrote appellee that, where the tax had been paid upon gasoline furnished the United States by a dealer for appellee's account, there was no provision for refund.

Appellants intimate, but do not definitely claim, that a distributor or dealer, if illegally compelled to pay taxes on sales to the United States, would under Alabama law be entitled to recover the amount so collected. They cite the Act of September 9, 1927, Gen. Acts 1927, p. 635. It appears to extend only to taxes paid while their amount or validity is in litigation. It contains no provision for interest. It was in effect when the attorney general made his ruling of November 22, 1928. They also cite the Act of July 17, 1931, Gen. Acts 1931, p. 527. It does not permit suit but merely authorizes the tax commission to refund. And finally they cite the Act of July 10, 1935. Section 379 gives to one who has paid taxes under protest the privilege of bringing suit within 60 days against the officer making the collection; it directs the court to determine what amount, if any, is excessive or illegal and to order it to be returned with interest by the State or its agencies receiving the same. Failure to sue within the specified period bars the claim. It is likely that a year or more would elapse before final determination of such a suit. In the meantime, monthly collections would have to be made, and so appellee would be compelled repeatedly, and at least as often as once every 60 days, to bring suits against the commission involving the same question. Upon obtaining the court's determination in its favor, appellee would be authorized, on presentation of certified copies of the judgment, to receive from the State the half it retained and from each of the counties its share of the other half. It would be necessary to follow the same course as to the amounts claimed in each of the suits. Resort may be had to equity in order to avoid the multiplicity of suits necessarily involved in the procedure prescribed for recovery of illegal exactions.

Appellee suggests that the provisions of the Act of July 10, 1935, are repugnant to § 14 of the Constitution of Alabama: "That the State of Alabama shall never be made a defendant in any court of law or equity." In support of that view, it shows that, since this suit was commenced, a telephone company brought suit under § 379 in the court below against the members of the state commission, appellants here, to recover license taxes paid under protest, and that they have filed a plea to the jurisdiction of the court, asserting that "the real party in interest is the State of Alabama"; that § 379 purports to give the State's consent to be sued only in its own courts, and that it "is immune from being impleaded in a court of the United States under the provisions of the Eleventh Amendment".

It sufficiently appears that appellee had no plain, adequate or complete remedy at law. *Union Pac. R. R. Co.* v. *Weld County*, 247 U. S. 282, 285-286. *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413, 426. *Di Giovanni* v. *Camden Ins. Ass'n*, 296 U. S. 64, 69. *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388. *American Airways* v. *Wallace*, 57 F. (2d) 877, 879. *Hopkins* v. *Southern Cal. Tel. Co.*, 275 U. S. 393, 399-400.

Affirmed.

Mr. Justice STONE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 727.—October Term, 1935.

Bibb Graves, as Governor of the State of Alabama, et al., Appellants, vs. The Texas Company. } Appeal from the District Court of the United States for the Middle District of Alabama.

[May 18, 1936.]

Mr. Justice Cardozo, dissenting.

Under the Alabama statute, the appellee, the Texas Company, is a "storer". It is one "who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same for any purpose." If it did business in some other way, it might be taxable as a "distributor", or "refiner", or "retail dealer". Doing business as it does, it is taxable as a "storer". It brings into Alabama a dangerous commodity which it keeps there indefinitely for indefinite uses. For the privilege of doing this it must make a payment to the state upon the termination of the storage, whether the purpose of the withdrawal is sale or something else. The statute was amended by adding the word "storing" in order to cover such activities. What the lawmakers have put into a statute, a court may not take out of it.

In its application to appellee, a tax thus conditioned is an excise upon the privilege of storage, and so the cases hold. *State* v. *City of Montgomery*, 228 Ala. 93; *Ervin* v. *State of Alabama*, 80 F. (2d) 432, 433; *Pan American Petroleum Corporation* v. *State of Alabama*, 67 F. (2d) 590. It is not transformed into a tax upon something else, or, more particularly, into a tax upon the privilege of sale, because payable when the gasoline is taken out of storage or because measured by the amount withdrawn. *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249, 252; *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 268; *Ervin* v. *State of Alabama, supra; Pan American Petroleum Corp.* v. *State of Alabama, supra; State* v. *City of Montgomery, supra.* The nature of the excise

being what it is, liability is the same whether withdrawal of the gasoline is for one purpose or another.

Panhandle Oil Co. v. *Knox*, 277 U. S. 218, is not a decision to the contrary. The tax considered in that case and condemned when applied to transactions with the government was upon the privilege of sale exclusively, and not upon some activity or condition antecedent thereto. The decision evoked dissent from four members of the court. It is now carried to new bounds by the ruling that "a tax upon anything so essential to the sale of the gasoline to the United States [as storage followed by withdrawal] is as objectionable as would be a tax upon the sale itself." If that ruling is to stand, it will equally forbid a tax upon the process of refining or upon transportation to a market (*Wheeler Lumber B. & S. Co.* v. *United States*, 281 U. S. 572), since these, as much as storage, are preliminary to sale. Cf. *Edelman* v. *Boeing Air Transport, Inc.*, *supra*; *Nashville, C. & St. L. R. Co.* v. *Wallace*, *supra*. Not yet has the immunity of government from indirect obstructions been pushed to that extreme.

Gasoline refined in Texas and transported to Alabama to be stored in tanks or terminals is there for general uses. Part of it in the usual course of business will be sold to the United States; part of it will be sold to others; part will be withdrawn without sale to anyone. This is not to say that the result would be any different though a definite sale were in view at the beginning of the storage. Even in such conditions, storage, like transportation, would be "not part of the sale but preliminary to it and wholly the vendor's affair." *Wheeler Lumber B. & S. Co.* v. *United States*, *supra*, at p. 579. However, the indefinite extension of the uses simplifies the problem. The burden, if any, upon the activities of government is remote and indeterminate. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514; *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508; *Trinityfarm Construction Co.* v. *Grosjean*, 291 U. S. 466. Sales to the United States are made under contracts for a stated term. There is no assurance that the tax or any part of it will be shifted to the buyer.

The decree should be reversed and the bill dismissed.

I am authorized to state that Mr. Justice BRANDEIS joins in this opinion.